

DUTY TO DEFEND – NATIONAL DEFENSE
AUTHORIZATION ACT, 110 STAT. 186

Letter from Andrew Fois to Orrin G. Hatch

March 22, 1996



U.S. Department of Justice

Office of Legislative Affairs

FILE

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 22, 1996

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Mr. Chairman:

In your letter of February 21, 1996, you made several inquiries regarding the President's directive that the Department of Justice decline to defend section 567 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 328-29 (1996), in the event of a constitutional challenge to that provision in court. Section 567 amends 10 U.S.C. § 1177 to require the Department of Defense to separate from the armed services most members of the armed forces who are HIV-positive. The President instructed the Secretary of Defense and other executive branch officials to implement section 567, but further instructed the Attorney General not to defend the constitutionality of section 567 in litigation.

You have asked me to provide "any Justice Department legal opinions relied upon in deciding not to defend the constitutionality

of the H.I.V. provision,” as well as “any guidelines or criteria that the Justice Department used in reaching this decision.” Although the Department of Justice orally advised the President of the applicable legal standards to apply in evaluating the constitutionality of section 567, it did not provide the President any written advice.

After consulting with the Department of Justice, the President asked the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to assess the effect of section 567 on the needs and purposes of the armed services. As the President subsequently indicated in his Signing Statement, the Secretary and the Chairman advised the President that

the arbitrary discharge of these men and women would be both unwarranted and unwise; that such discharge is unnecessary as a matter of sound military policy; and that discharging service members deemed fit for duty would waste the Government’s investment in the training of these people and would be disruptive to the military programs in which they play an integral role.

Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 Weekly Comp. Pres. Doc. 260, 261 (Feb. 10, 1996) (enclosed). [*2]

In his Signing Statement, the President stated that he agreed with the assessment of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. Based on that assessment, the President “concluded that this discriminatory provision [section 567] is unconstitutional,” in that it “violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose.” *Id.* The President further stated that, “[i]n accordance with my constitutional determination, the Attorney General will decline to defend this provision.” *Id.*¹ In addition, the President in-

¹ For another case in which the Department declined to defend the constitutionality of a statute as a direct result of a Presidential determination that the enactment was unconstitutional, see Letter from Assistant Attorney General Stuart M. Gerson to President of the Senate Dan Quayle (Nov. 4, 1992) (Senate Legal Counsel document No. 38) (notifying Congress that because President Bush had determined that the “must-carry” provisions of

structed the Secretaries of Defense, Veterans Affairs and Transportation to implement the Act in a manner that “ensure[s] that these [involuntarily discharged] service members receive the full benefits to which they are entitled.” Id.

You also have asked me to list “all previous instances when the Justice Department has refused to defend the constitutionality of a statute.” As far as we are aware, the most comprehensive catalogue of such cases is one previously compiled by the Senate Legal Counsel. The Senate Legal Counsel list, which is enclosed, indexes 45 communications and memoranda between Congress and the Department of Justice covering the years 1975-1993, detailing, inter alia, virtually all instances in that period in which either the Department has represented that it will decline to defend the constitutionality of a statute, or where the executive branch has determined that it will not enforce or implement a statute that it believes to be unconstitutional.² [*3]

As the documents compiled by the Senate Legal Counsel indicate, the Department has declared that it will decline to defend the constitutionality of a statute in a wide variety of circumstances. For example, in several of the cases listed by the Senate Legal Counsel,

the Cable Television Consumer Protection and Competition Act of 1992 were unconstitutional, the Department of Justice could not defend the constitutionality of those provisions in court). See also Drew S. Days III, In Search of the Solicitor General’s Clients: A Drama with Many Characters, 83 Ky. L.J. 485, 489-94 (1994-95) (discussing instances in which the President has instructed the Department of Justice to adopt certain legal positions).

² In recent correspondence postdating the Senate Legal Counsel’s list, the Attorney General notified the President of the Senate and the Speaker of the House (i) that the Department of Justice has had a longstanding policy to decline to enforce the abortion-related speech prohibitions in 18 U.S.C. § 1462 and related statutes because such prohibitions plainly violate the First Amendment, and (ii) that, in light of this policy, the Department will not enforce the abortion-related speech prohibition in § 1462, as amended by section 507(a)(1) of the Telecommunications Act of 1996, and will not defend the constitutionality of that prohibition in two recently filed district court cases, See Letters from Attorney General Janet Reno to President of the Senate Albert Gore, Jr. and Speaker of the House Newt Gingrich (Feb. 9, 1996) (discussing Sanger v. Reno, Civ. No. 96-0526 (E.D.N.Y.), and American Civil Liberties Union v. Reno, Civ. No. 96-963 (E.D. Pa.)). This notification was based upon, and consistent with, a similar notification to Congress made by Attorney General Civiletti in 1981. See Letter from Attorney General Benjamin R. Civiletti to President of the Senate Walter F. Mondale (Jan. 13, 1981) (Senate Legal Counsel document No. 10).

the Department defended the constitutionality of a statute in district court, but declined to appeal an adverse decision because of dispositive precedent, the risk of producing damaging appellate precedent, or other litigation considerations. In a smaller group of cases, such as those described in footnote 2, supra, the President or the Department of Justice declined to enforce or implement a statute in the first instance, and the Department thereafter declined to defend the constitutionality of the statute in court.³

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

(a) United States v. Lovett, 328 U.S. 303 (1946). As required by statute, the President withheld the salaries of certain federal officials. The Solicitor General, representing the United States as defendant, nonetheless joined those officials in arguing that the statute was an unconstitutional bill of attainder. Id. at 306. The Attorney General suggested that Congress employ its own attorney to argue in support of the validity of the statute. Congress did so, id., and the Court of Claims and the Supreme Court gave Congress's counsel leave to appear as amicus curiae on behalf of the enactment. The Supreme Court held that the statute was an unconstitutional bill of attainder.

(b) INS v. Chadha, 462 U.S. 919 (1983). Pursuant to a provision of the Immigration and Nationality Act, the INS implemented a "one-house veto" of the House of Representatives that ordered the INS to overturn its suspension of Chadha's deportation. Id. at 928.⁴ Nonetheless, when Chadha petitioned for review of the

³ In this category, see also, for example, Myers v. United States, 272 U.S. 52 (1926), and Humphrey's Executor v. United States, 295 U.S. 602 (1935)

⁴ See also Reply Brief for the Appellant [INS] in No. 80-1832. at 11-14 (explaining that the INS issued an order deporting Chadha, and "intended to enforce the law by subjecting Chadha to deportation" unless and until the court of appeals held the law unconstitutional).

INS's deportation order, the INS -- represented by the Solicitor General in the Supreme Court -- joined Chadha in arguing that the one-house veto provision was unconstitutional. *Id.* at 928, 939. Senate Legal Counsel intervened on behalf of the Senate and the House to defend the validity of the statute. *Id.* at 930 & n.5, 939-40. The Supreme Court invalidated the statutory one-house "veto" as a violation of the separation of powers. [*4]

(c) *Morrison v. Olson*, 487 U.S. 654 (1988). Pursuant to the Ethics in Government Act of 1978, the Attorney General requested appointment of an independent counsel to investigate possible wrongdoing of a Department official. *Id.* at 666-67. Despite the fact that the Department thus had "implemented the Act faithfully while it has been in effect,"⁵ the Solicitor General nevertheless appeared in the Supreme Court on behalf of the United States as amicus curiae to argue, unsuccessfully, that the independent counsel provisions of the Act violated the constitutional separation of powers.

(d) *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). The FCC had a longstanding policy of awarding preferences in licensing to broadcast stations with a certain level of minority ownership or participation. After the FCC initiated a review of this policy, *id.* at 559, a statute was enacted forbidding the FCC from spending any appropriated funds to examine or change its minority ownership policies, *id.* at 560, 578 & n.29. The FCC "[c]ompl[ied] with this directive": it terminated its policy review and reaffirmed license grants in accord with the minority preference policy. *Id.* at 560. Nonetheless, the Acting Solicitor General, appearing on behalf of the United States as amicus curiae, argued that, insofar as the statute required the FCC to continue its preference policy, it worked an unconstitutional denial of equal protection. See Brief for the United States as Amicus Curiae Supporting Petitioner in No. 89-453, at 26-27. The Acting Solicitor General authorized the FCC to appear before the Court

⁵ Letter from Acting Attorney General Arnold I. Burns to President of the Senate George Bush at 2 (Aug. 31, 1987) (Senate Legal Counsel document No. 26).

through its own attorneys, “in order for the Court to have the benefit of the views of the administrative agency involved.” Id. at 1 n.2. FCC’s counsel, representing the Commission as Respondent, urged the Court to uphold the constitutionality of the FCC policy and the statutory enactment. Senate Legal Counsel also appeared on behalf of the Senate as amicus curiae to defend the constitutionality of the statute. The Court held that the statutorily mandated FCC policy was constitutional.

(e) Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied, 376 U.S. 938 (1964). A federal statute permitted the Surgeon General to condition federal funding for hospital construction on assurance by an applying State that the hospital facilities in question did not discriminate on account of race; but the statute explicitly instructed the Surgeon General to make an exception to this requirement where discrimination was accompanied by so-called “separate but equal” hospital facilities for all races. The Surgeon General issued a regulation that included such a “separate but equal” exception, id. at 961 & n.2 (quoting 42 C.F.R. § 53.112 (1960)), and subsequently approved federal funding to defendant hospitals, which were openly discriminatory, id. at 962-63, 966. The Department intervened on behalf of the United States in a private class action brought by black physicians, dentists and patients against the hospitals, and joined the plaintiffs in a constitutional “attack on the congressional Act and the regulation made pursuant thereto.” Id. at 962. The en banc court of appeals held [*5] that the statute and regulation violated the equal protection component of the Fifth Amendment’s Due Process Clause. Id. at 969-70.

(f) Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979). In this case, a statute created a program pursuant to which the Army could sell surplus rifles at cost, but only to members of the National Rifle Association. The Army, in compliance with the statute, denied plaintiff an opportunity to purchase a rifle at cost because he was not an NRA member. Id. at 1040. Nonetheless,

the Department of Justice concluded -- and informed the court -- that the NRA membership requirement violated the equal protection component of the Fifth Amendment's Due Process Clause because the discrimination against non-NRA members "does not bear a rational relationship to any legitimate governmental interest and is therefore unconstitutional." *Id.* at 1044. The Department reached this conclusion on the basis of advice from the Army that the membership requirement "serves no valid purpose" that was not otherwise met. *Id.*⁶ The district court afforded Congress an opportunity to "file its own defense of the statute should it choose to do so," *id.*, but Congress declined to act on this invitation. *Id.* The court permitted the NRA itself to intervene and argue on behalf of the statute's constitutionality. The district court concluded that the statute was subject to strict scrutiny (because it discriminated on the basis of the fundamental right of association) and invalidated the enactment. *Id.* at 1044-49.

(g) League of Women Voters of California v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980). The Public Broadcasting Act of 1967, as amended, prohibited noncommercial television licensees from editorializing or endorsing or opposing candidates for public office. The Attorney General concluded that this prohibition violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge.⁷ The defendant FCC, through the Department of Justice, represented to the court that it would seek to impose sanctions on a licensee who violated the statute, if only for the purposes of "test litigation," 489 F. Supp. at 519-20; nevertheless, the FCC informed the court that it would not defend the statute's constitutionality, *id.* at 518. Senate Legal Counsel appeared in the case on behalf of the Senate as *amicus curiae*, *id.*, and successfully

⁶ See also Letter from Assistant Attorney General Barbara Alien Babcock to President of the Senate Walter F. Mondale (May 8, 1979) (Senate Legal Counsel document No. 3).

⁷ See Letter from Attorney General Benjamin R. Civiletti to Senate Legal Counsel Michael Davidson (Oct. 11, 1979) (Senate Legal Counsel document No. 6). See also FCC v League of Women Voters of California, 468 U. S. 364, 370-71 & n.8 (1984).

urged the trial court to dismiss the case as not ripe for adjudication in light of the unlikelihood that any enforcement action would transpire. While appeal of that decision was pending, a successor Attorney General reconsidered the Department's previous position and decided that the [*6] Department could defend the statute's constitutionality.⁸ The court of appeals accordingly remanded the case to the district court for consideration of the merits of the case. The Supreme Court ultimately held that the statute violated the First Amendment. FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

(h) Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.). Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (the "must carry" provisions) require cable operators to carry on their systems a prescribed number of signals of local commercial and qualified non-commercial television stations. The Act was enacted over President Bush's veto. In his veto message, the President stated that one of the reasons for his veto was that the must-carry provisions were unconstitutional. See Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, Pub. Papers of George Bush 1751 (Oct. 3, 1992). Despite the President's conclusion, the FCC took steps toward implementing the must-carry provisions "in order to comply with the 1992 Act." 57 Fed. Reg. 56,298-99 (1992).⁹ However, in the litigation challenging the constitutionality of the must-carry provisions, the Department of Justice,

⁸ See Letter from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond and Ranking Minority Member Joseph R. Biden, Jr. (Apr. 6, 1981) (Senate Legal Counsel document No. 12) (reprinted as The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981)).

⁹ See also Standstill Order in Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.), at 2 ¶ 4 (Dec. 9, 1992) (FCC will take remedial action to address violations of section 5, albeit 120 days after filing of complaints); Defendants' Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in this Case and its Related Cases in Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.), at 10-11 (Nov. 10, 1992) (representing that FCC would implement section 4 regulations in April 1993 and that FCC will take remedial action to address violations of section 5, albeit 120 days after filing of complaints).

appearing on behalf of defendant FCC, informed the district court that it declined to defend the constitutionality of the must-carry provisions, “consistent with President Bush’s veto message to Congress.”¹⁰ The Department urged the court to permit adequate [*7] time to provide Congress the opportunity to defend the validity of the statute.¹¹ While preliminary proceedings were ongoing in the district court, the Clinton Administration reconsidered President Bush’s previous position and decided that the Department should defend the constitutionality of the must-carry provisions. The three-judge district court subsequently held that the must-carry provisions were constitutional. 819 F. Supp. 32 (D.D.C. 1993). The Supreme Court vacated and remanded that decision so that the district court could resolve genuine issues of material fact and apply its findings to the constitutional test articulated by the Court. 114 S. Ct. 2445 (1994). The three-judge panel resolved the factual disputes and once again concluded that the must-carry provisions pass constitutional muster. 910 F. Supp. 734 (D.D.C. 1995). The Supreme Court recently noted probable jurisdiction to review that decision. 116 S. Ct. 907 (1996).

In addition, it is worth noting several other cases in which the Department of Justice argued against the constitutionality of a statute in court, either where there was no occasion for the executive branch to enforce or implement the statute prior to litigation, or where the statute did not provide for any executive branch implementation.¹²

¹⁰ Defendants’ Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in this Case and its Related Cases in Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.), at 2 (Nov. 10, 1992). See also *id.* at 4; Letter from Assistant Attorney General Stuart M. Gerson to President of the Senate Dan Quayle (Nov. 4, 1992) (Senate Legal Counsel document No. 38) (notifying Congress that because President Bush had determined that the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992 were unconstitutional, the Department of Justice could not defend the constitutionality of those provisions in court).

¹¹ Defendants’ Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in this Case and its Related Cases in Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.), at 5-8 (Nov. 10, 1992).

¹² See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (Attorney General and Solicitor General,

You also have asked me to provide “the guidelines used by the Justice Department to decide when it will defend the constitutionality of a statute and when it will not.” There exist no formal guidelines that the Attorney General, the Solicitor General and other Department officials consult in making such decisions. As indicated by the cases on the Senate Legal Counsel’s list, [*8] including those discussed above, different cases can raise very different issues with respect to statutes of doubtful constitutional validity; accordingly, there are a variety of factors that bear on whether the Department will defend the constitutionality of a statute.¹³

though representing the Attorney General and FEC in defending constitutionality of most parts of the Federal Election Campaign Act of 1971, also appeared for defendant Attorney General and for the United States as amicus curiae in declaratory judgment action, arguing against the constitutionality of the appointment of FEC members by members of Congress); In re Benny, 44 B.R. 581 (N.D. Cal. 1984), aff’d, 812 F.2d 1133 (9th Cir. 1987) (Department of Justice represented United States as intervenor in arguing that statute violated Appointments Clause by permitting Congress to appoint to new judgeships bankruptcy judges whose terms already had expired) (see Senate Legal Counsel document No. 15); Synar v. United States, 626 F. Supp. 1374, 1379 (D.D.C.), aff’d sub nom. Bowsheer v. Synar, 478 U.S. 714 (1986) (Department of Justice appeared on behalf of defendant United States in declaratory judgment action to argue against the constitutionality of Gramm-Rudman-Hollings Act provision that gave Comptroller General a role in exercising executive functions under the Act) (see Senate Legal Counsel document No. 23); Hechinger v. Metropolitan Washington Airports Auth., 845 F. Supp. 902, 904 (D.D.C.), aff’d, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995) (Department of Justice appeared on behalf of United States as intervenor to argue that statute providing certain powers to Airport Authority violated separation of powers) (see Senate Legal Counsel document No. 37).

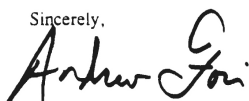
¹³ From time to time, various Attorneys General, Solicitors General, and Assistant Attorneys General have written or testified concerning the various factors and rules of thumb that they consider in deciding whether to defend the constitutionality of statutes. See, e.g., Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 9-10 (1975) (Statement of Assistant Attorney General Rex Lee) (Senate Legal Counsel document No. 1). Memorandum from Assistant Attorney General John M. Harmon to Assistant Attorney General Barbara A. Babcock and Deputy Assistant Attorney General James P. Turner, re: Section 208 -- Applicable Standards for Determining Whether or Not to Defend the Constitutionality of a Congressional Enactment (Feb. 2, 1978) (Senate Legal Counsel document No. 2); The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980) (Letter from Attorney General Benjamin R. Civiletti to the Chairman of the Senate Subcommittee on Limitations of Contracted and Delegated Authority). The most recent example is an article by the current Solicitor General: Days, In Search of the Solicitor General’s Clients, supra note 1, 83 Ky. L.J. at 499-503.

FOIS TO HATCH, MAR. 22, 1996

Finally, pursuant to discussions between our respective staff counsel, I am enclosing a copy of a recent Opinion of the Assistant Attorney General for the Office of Legal Counsel.¹⁴ The OLC Opinion concerns a related matter that is not directly at issue in this case -- namely, the circumstances under which a President can and should decline to execute statutory provisions that he believes are unconstitutional. As noted above, the President in the instant matter instructed the relevant agencies to implement section 567 of the Defense Authorization Act.

I hope you find this letter helpful. Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in black ink that reads "Andrew Foia". The signature is written in a cursive, flowing style.

Andrew Foia
Assistant Attorney General

Enclosures

¹⁴ That Opinion has been published as Walter Dellinger, Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva, 48 Ark. L. Rev. 313 (1995).