HB
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For an Act entitled:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 24.20.060 is amended by adding a new paragraph to read:

(8) to litigate in behalf of the legislature during the interim between sessions, if authorized by a majority vote of the full membership of the council, as follows:

(A) initiate civil action to enforce legislative subpoenas;

(B) intervene or appear as amicus curiae in any case in which the power or responsibility of the legislature is placed in issue;

(C) defend legislators, legislative officers or employees, and legislative agencies in actions brought against them in which the validity of their official acts or proceedings are placed in issue.

HB45

Legal Services for Congress

Congress now depends on the executive branch's Justice Department for its legal services. Both branches would be better served if Congress had its own legal counsel.

By Dorothy Sellers

THE NEED OF Congress for legal services is beyond question. It is evident from both the volume and substance of present-day litigation involving members, officers, and committees of Congress. The Joint Committee on Congressional Operations in its final report for the Ninety-fourth Congress (December 31, 1976) identified more than forty pending cases "of vital interest to the Congress." The report lists ninety-eight senators and representatives who had assumed litigative as well as legislative responsibilities.

These cases frequently raise core governmental and constitutional issues. Three from the United States Court of Appeals for the District of Columbia Circuit illustrate the point:

1. In *United States v. American Telephone and Telegraph Company*, 551 F. 2d 384 (1976), a congressional subcommittee investigating the scope of warrantless wiretapping for alleged national security reasons subpoenaed from A.T.&T. all wire-tap request letters sent to it or its subsidiaries by the Federal Bureau of Investigation. Because the White House feared public disclosure of the subpoenaed documents, the United States, represented by the Department of Justice, sued A.T.&T. to enjoin compliance with the subpoena. Rep. John Moss, through private counsel, intervened for himself and on behalf of the committee and the House of Representatives. On appeal from a district court decision largely favorable to the plaintiff, the court, characterizing the action as "a portentous clash between the executive and legislative branches," remanded without decision in December of 1976 in the hope that the parties might settle the case. But those negotiations failed, and the court reheard the case in June of 1977.

2. In *Clark v. Valeo*, 559 F. 2d 642 (1977), Ramsey Clark, an unsuccessful candidate for the Democratic party's senatorial nomination in New York, challenged the constitutionality of the provisions of the Federal Election Campaign Act under which a single house of Congress may disapprove regulations promulgated by the Federal Election Commission. The secretary of the Senate and the clerk of the House of Representatives were named defendants. Each was represented by private counsel. Over their objection, the United States, represented by the Department of Justice, intervened on the side of plaintiff on behalf of the president and executive branch. Five constitutional questions were certified to the court of appeals en banc pursuant to the unique judicial review provisions of the act. In January of 1977 the court dismissed the case for lack of a ripe case or controversy within the meaning of Article III of the Constitution. The Supreme Court affirmed the judgment in *Clark v. Kimmett* in June (97 S.Ct. 2667).

3. *Dellums v. Powell*, 561 F. 2d 242 (1977), arose from the 1971 May Week demonstrations in the District of Columbia. On May 5 approximately twelve hundred people assembled on the steps of the Capitol to hear speeches by members of the House of Representa-

tives and to present them with a "peoples' peace treaty." The District of Columbia police and the Capitol police dissolved the assemblage by arresting the participants. A district court jury awarded Rep. Ronald Dellums, a scheduled speaker at the disrupted meeting, $7,500 for the invasion of his First Amendment rights. Representative Dellums had private counsel. The Capitol police chief, who was found jointly and severally liable for the award with the District of Columbia police chief, was represented by the Justice Department. The court of appeals affirmed the jury's findings of liability but remanded for a reduction of damages.

Congress Depends on the Justice Department

At present legal services for Congress are provided *ad hoc*, primarily by the Department of Justice and to a lesser extent by private counsel. During the period 1971–75 the Department of Justice defended members, officers, employees, or agencies of Congress in approximately sixty cases. The cases above illustrate the inexpedience of congressional reliance on the Department of Justice. In each the department not only failed to represent a recognizable congressional interest but appeared in opposition to it.

The department's representation of Congress is founded more in custom than statute. 2 U.S.C. §118 empowers the department to defend the officers of Congress against claims relating to their official duties. There is no comparable statutory authority for the department's representation of congressional members and committees. Former Attorney General Edward H. Levi characterized that representation as a matter of comity rather than as an absolute obligation.

The department may have discretion to represent Congress under 28 U.S.C. §§ 517 and 518, which authorize the attorney general to conduct litigation in which the "United States" has an interest, but the definition of "United States" has proved elusive. In *United States* v. *A.T.&T.* and *Clark* v. *Valeo* the department appeared as plaintiff or intervenor-plaintiff "United States" solely on behalf of the executive branch in opposition to the legislative. Yet, in defending the executive branch, Justice has argued with perfect inconsistency that an action which pits the legislative branch against the executive cannot present a case or controversy because the "United States" appears on both sides of the issue. (*Statts* v. *Lynn*, D.D.C. No. 75-0551, dismissed by stipulation November 26, 1975.)

The occasions on which the department does not represent or actively opposes congressional interests reflect the indisputable fact that its primary responsibilities and loyalties run to the executive branch. This raises a question as to the appropriateness of the present attorney-client relationship between the department and Congress under the doctrine of separation of powers. The effective operation of the doctrine requires, if not eternal vigilance, at least continuing suspicion on the part of each branch toward the others. **The present system of providing legal services for Congress primarily through the executive branch cannot be reconciled with the doctrine of separation of powers: it leaves Congress perpetually unprepared for the increasingly frequent and inestimably important occasions when it must judicially protect its prerogatives from executive branch inroads.**

The situation is equally uncommendable from the department's viewpoint. Its sometimes congressional client is assured a second-class status in relation to its principal client, the executive branch.

Congress Needs Its Own Counsel

The objective should be to assure the uninterrupted availability of legal services for Congress, regardless of the nature of the case. To expand the role of private counsel is to perpetuate a makeshift solution to an unremitting problem. In addition, private counsel are expensive and, when retained case by case, necessarily lack a comprehensive perspective of the problems and policies of congressional litigation.

Recent Congresses have considered proposals for establishing a source of representation within the Congress. The principal measures have been S. 2731, which would have established an Office of Congressional Legal Counsel and was passed in the Ninety-fourth Congress by the Senate but not acted on by the House, and, in the Ninety-fifth Congress, Title II ("Congressional Legal Counsel") of S. 555, the Public Officials Integrity Act of 1977, which passed the Senate on June 27 and is now under consideration in the House.

These proposals would establish within Congress a permanent Office of Congressional Legal Counsel. The legal counsel would be appointed jointly by the Speaker of the House and the president *pro tempore* of the Senate without regard to political affiliation and solely on the basis of fitness to perform the duties of office. The counsel, in turn, would appoint necessary assistants on the same merit basis.

A professional law office serving the entire Congress would have benefits beyond providing needed representation for litigation purposes. Ideally, litigation is the last step in the process of providing legal services. The earlier part of the process—giving advice and counsel—is aimed at avoiding litigation and formulating positions that are legally as well as politically sound. The sources of advisory and litigative services to Congress now are bifurcated: the advisory function is distributed among the various committee counsel (with a consequent unevenness of quality from committee to committee); the litigative function is jointly discharged by the Department of Justice and private counsel. The establishment of an Office of Congressional Legal Counsel would provide a unitary, nonpartisan source for advisory and litigative legal services. But the congressional legal counsel would not displace existing committee counsel. Rather he would be authorized to advise, consult, and co-operate with any

committee or subcommittee regarding the use of congressional investigative powers.

In litigation the proposals would empower the congressional legal counsel on direction from Congress (1) to initiate civil actions to enforce congressional subpoenas, (2) to defend congressional individuals or entities in pending actions in which the validity of their official acts or proceedings was placed in issue, and (3) to intervene or appear as *amicus curiae* in any case in which the powers and responsibilities of Congress are placed in issue. In addition, S. 555 authorizes the counsel to represent Congress in proceedings involving use immunity for persons who testify before Congress pursuant to 18 U.S.C. §§ 6002 and 6005.

The primary substantive difference between S. 555 and S. 2731 is that the former would not allow the congressional legal counsel to commence legal actions—other than those against nongovernmental parties to enforce congressional subpoenas—while the latter would authorize him to bring suit to "require an officer or employee of the executive branch of the government to act in accordance with the Constitution and laws of the United States."

Supreme Court Draws Distinction

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that the Federal Election Commission could not constitutionally exercise the enforcement powers conferred on it because of the exclusion of the president from participation in the appointment of a majority of its members. The Court drew a distinction between a power "essentially of an investigative and informative nature, falling in the same category as those powers which Congress might delegate to one of its own committees" and the power to seek judicial enforcement of a law of the United States. The former may be exercised by persons appointed without presidential participation; the latter may not.

The Court stated: "The commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law and it is to the president, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"

This distinction affects the proposals for establishing a congressional legal counsel. Both S. 2731 and S. 555 would authorize the counsel to bring civil actions to enforce congressional subpoenas and orders. Congress now has two methods for handling contempt of Congress cases. It may refer them to the United States attorney for criminal prosecution as a misdemeanor pursuant to 2 U.S.C. §§ 192, 194, or it may bring the contemnor to trial before Congress, although this procedure has not been used since 1945.

The congressional contempt cases inevitably arise from the use of the congressional investigative power. For this reason it appears that a congressionally appointed legal officer may constitutionally bring a civil action in support of that power, and this could be "regarded as merely in aid of the legislative functions of Congress."

The proposals would empower the congressional legal counsel to undertake the defense of congressional committees and personnel in cases in which the validity of their official actions was placed in issue. As this would be in a previously filed action, the counsel would not be involved in the discretionary decision to institute legal proceedings.

Because the counsel's responsibility would be limited to the defense of pending challenges to official congressional actions, it may be construed as supportive of the legislative function of Congress rather than as an invasion of the presidential power. This conclusion is fortified by the practicalities of the situation—exemplified by *Clark v. Valeo*—in which the Department of Justice declined to represent a congressional defendant. Surely Congress may appoint a replacement counsel in that situation.

Counsel Also May Be Friend of the Court

Both proposals would allow the congressional legal counsel to intervene or appear as *amicus curiae* in cases challenging the constitutionality of any law of the United States in which the United States is a party. Intervening and appearing as *amicus curiae* are totally different undertakings. An *amicus curiae* is not a party to the litigation and independently cannot request any form of relief. Thus an appearance *amicus curiae* could not infringe on the executive's power to seek judicial relief.

In contrast, an intervenor is a party to the action and able to request any appropriate relief and to be bound by the ultimate judgment. There is no way of predicting whether a constitutional challenge to an act of Congress will come from a plaintiff seeking declaratory relief or from a defendant charged with violating the act. The right to intervene in support of the constitutionality of a law of the United States may carry with it the discretionary power to appear as plaintiff seeking judicial relief.

The provisions by which the congressional legal counsel may be directed to intervene or appear as *amicus curiae* are clear attempts to protect Congress against the exceedingly rare situation when the executive branch chooses not to defend all or part of the constitutionality of a statute. This situation in fact occurred in *Buckley v. Valeo*. The Department of Justice filed two briefs in the Supreme Court, one on behalf of the defendant attorney general and a second *amicus* brief that argued against the constitutionality of the grant of enforcement powers to the Federal Election Commission. The congressional interest in that case could have been protected without infringing on

executive responsibilities if counsel ... appeared as *amicus curiae* rather than as an intervenor.

But provisions like that in S. 2731 that would authorize the congressional legal counsel to institute actions against the executive branch to compel it to act in accordance with the Constitution and laws of the United States would appear to be unsalvageable in light of *Buckley v. Valeo*.

Challenges by Individual Members of Congress

Buckley v. Valeo does not foreclose the possibility that an individual member of Congress may bring suit against the executive branch. Members of Congress, although officers of the United States, are outside the scope of the appointments clause because the Constitution expressly provides the method for their selection. The Supreme Court has never addressed the question of the standing of individual members of the legislative branch to seek judicial relief from actions taken by members of the executive branch. Circuit court decisions, however, hold the member-plaintiff to the standing requirements applicable to all other plaintiffs—the member must demonstrate a specific nonspeculative personal injury in fact. *Harrington v. Bush*, 553 F. 2d 190 (D.C. Cir. 1977); *Harrington v. Schlesinger*, 528 F. 2d 455 (4th Cir. 1975); *Holtzman v. Schlesinger*, 484 F. 2d 1307 (2d Cir. 1974).

The narrow area in which members of Congress do have standing to challenge executive branch action is illustrated by two cases, again from the District of Columbia Circuit. In *Kennedy v. Sampson*, 511 F. 2d 430 (1974), Sen. Edward Kennedy sought a declaratory judgment that the Family Practice of Medicine Act was validly enacted despite a purported pocket veto. The court found the requisite injury—and therefore standing to sue—in the nullification of Kennedy's specific vote and of the congressional power to override a veto.

In *Pressler v. Simon*, 428 F.Supp. 302 (D.D.C. 1976), the three-judge court, although finding for the defendants on the merits, upheld the standing of the plaintiff, Rep. Larry Pressler, to challenge the Postal Revenue and Salary Act of 1967 and the Executive Salary Cost-of-Living Adjustment Act of 1975 as violative of Article I, Section 6, of the Constitution. Citing *Kennedy v. Sampson*, the Court stated, "a Congressman has standing to sue by reason of his office where executive action has impaired the efficacy of his vote. . . ."

Litigation Must Be Directed by Congress

The proposals for establishing an Office of Congressional Legal Counsel would not allow litigation other than as directed or consented to by Congress. Because the individual members of Congress are beyond the pale of the appointments clause, the question is why cannot the actual lawyering on behalf of Congress be delegated without violating the appointments clause. The answer is twofold.

First, as noted earlier, Congress cannot appoint anyone to perform duties other than in aid of those functions Congress may itself carry out. A nonlegislative function—for example, enforcement of the laws—cannot properly be delegated because it is not a proper congressional function. Second, even if an individual member of Congress demonstrates standing to sue on his own behalf, that showing is not automatically transferable to Congress as an institution. And a practical problem with assigning a congressionally appointed legal officer to represent an individual member of Congress is that the decision on standing is frequently—as in *Kennedy v. Sampson*— inseparable from the decision on the merits and, therefore, simply comes too late for assignment to a congressionally appointed legal officer.

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At present the legislative branch is dependent on the executive branch for legal services. The arrangement is inexpedient for both, particularly Congress. It has no reliable source of representation for judicial confrontations with the executive branch. Proposals for establishing an Office of Congressional Legal Counsel are likely to recur as the quantity and importance of litigation involving congressional interests continue to increase.

While it is probable that a statute conferring on a congressionally appointed legal officer the authority to sue an executive branch member for alleged errors of omission or commission in enforcing the laws would be struck down under the appointments clause, there is nevertheless a large area in which the litigative responsibilities of a congressional counsel could be regarded as incidental to the legislative function and outside the appointments clause.

An additional benefit to Congress would be that of merging the advisory and litigative sides of the legal services available to it and of providing a central source for analyzing court and administrative rulings and recommending legislative responses.

While a proposal for establishing a legal office in Congress, where more than half the members are lawyers, may have the superficial appearance of carrying coals to Newcastle, in reality it could provide necessary and now unavailable legal services to Congress. ▲

from joining or supporting any partisan political organization, faction or activity which would tend to undermine the essential nonpartisan nature of their functions and services. However, this section does not restrict the executive director or members of the professional staff from expressing private opinion, registering or voting. (§ 5 ch 17 SLA 1960; am § 4 ch 126 SLA 1966)

Sec. 24.20.060. Powers. The legislative council has the following powers:

(1) to organize and adopt rules for the conduct of its business;

(2) to hold public hearings, administer oaths, issue subpoenas, compel the attendance of witnesses and production of papers, books, accounts, documents, and testimony, and to have the deposition of witnesses taken in a manner prescribed by court rule or law for taking depositions in civil actions when consistent with the powers and duties assigned to the council by §§ 10 — 140 of this chapter;

(3) to call upon all state officials, agencies and institutions to give full cooperation to the council and its executive director by collecting and furnishing information, conducting studies and making recommendations;

(4) in addition to providing the administrative services required for the operation of the legislative branch:

(A) provide the technical staff assistance in research, reporting, drafting and counselling requested by standing, interim and special committees and spot research and drafting services for individual members in conformity with law and legislative rules;

(B) conduct a continuing program for the revision and publication of the acts of the legislature;

(C) execute a program for the oversight of the administration and construction of laws by state agencies and the courts through regulations, opinions and rulings;

(D) Repealed by § 6 ch 95 SLA 1971.

(E) operate and maintain the state legislative reference library;

(F) do all things necessary to carry out legislative directives and law, and the duties set out in the uniform rules of the legislature;

(5) to exercise control and direction over all legislative space, supplies, and equipment and permanent legislative help between legislative sessions;

(6) to produce, publish, distribute and to contract for the printing of reports, memoranda and other materials it finds necessary to the accomplishment of its work; and

(7) to take appropriate action for the preconvening and post-session work of each legislative session including the employment one week in advance of each session of not more than 10 temporary legislative employees. The continuing employment of the temporary legislative employees is subject to legislative approval when the session convenes. (§ 6 ch 17 SLA 1960; am § 5 ch 126 SLA 1966; am § 6 ch 95 SLA 1971)

per diem allowance paid to other members of the legislature. (§ 2 ch 95 SLA 1971)

Sec. 24.20.201. Powers. (a) The Legislative Budget and Audit Committee has the power to:

(1) organize, adopt rules for the conduct of its business and prescribe procedures for the comprehensive fiscal analysis, budget review and post-audit functions;

(2) hold public hearings, administer oaths, issue subpoenas, compel the attendance of witnesses and production of papers, books, accounts, documents and testimony, and have the deposition of witnesses taken in a manner prescribed by court rule or law for taking depositions in civil actions;

(3) require all state officials and agencies of state government to give full cooperation to the committee or its staff in assembling and furnishing requested information;

(4) review revenue projections, state agency appropriation requests, the expenditure of state funds, including the relationship between state agency program accomplishments and legislative intent, and the fiscal policies and procedures of state government;

(5) review and approve proposed changes to agency authorized budgets as provided in the Executive Budget Act (AS 37.07);

(6) make recommendations concerning appropriations, their expenditure and the fiscal policies and procedures of state government to the governor when appropriate, and to the legislature;

(7) prepare and distribute reports, memoranda or other necessary materials.

(b) Nothing in this chapter authorizes the referral by the presiding officer of legislation to the committee at regular or special sessions of the legislature. (§ 2 ch 95 SLA 1971; am § 1 ch 74 SLA 1977)

Effect of amendment. — The 1977 amendment rewrote paragraph (5) of subsection (a).

Editor's note. — Section 4, ch. 74, SLA 1977 provides: "The requirement of approval by both the governor and the Legislative Budget and Audit Committee of revision of appropriations to the extent permitted in AS 37.07.080(h) is intended to provide a degree of flexibility in administration of the budget provided both required approvals are obtained. It is not intended that these revisions may be made with the sole approval of the governor. If a court of competent jurisdiction invalidates the requirement of approval by the Legislative Budget and Audit Committee for revision as authorized in AS 37.07.080(h) (1), (2) or (3), the entire paragraph or paragraphs for which that requirement was invalidated shall be totally void and of no effect whatsoever. If that requirement is invalidated for the entire subsection AS 37.07.080(h), that entire subsection shall be totally void and of no effect whatsoever."

Section 5, ch. 74, SLA 1977 provides: "Executive Order No. 20 dated June, 1962 is repealed."

Sec. 24.20.211. Legislative finance division. The legislative finance division is established as a permanent staff agency responsible to the Legislative Budget and Audit Committee for performance of fiscal analysis and budget review functions. (§ 2 ch 95 SLA 1971)