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Dellums v. Smith: Judicial Review Under the Ethics in Government Act and Neutrality Act Application to Executive Actions

I. INTRODUCTION

Observe good faith and justice toward all nations. Cultivate peace and harmony with all. . . . The Nation which indulges toward another an habitual hatred or an habitual fondness is in some degree a slave. It is a slave to its animosity or to its affection, either of which is sufficient to lead it astray from its duty and its interest.

'Tis our true policy to steer clear of permanent alliances, with any portion of the foreign world.—George Washington.¹

The persistent fear that the United States would be drawn into a disastrous European conflict led Congress, with the strong support of President Washington, to enact the Neutrality Act of 1794.² The Neutrality Act prohibits private citizens from engaging in acts of aggression toward nations with whom the United States is at peace.³ Although in recent years the Neutrality Act had fallen into disuse,⁴ it became the basis for a spirited challenge to the Reagan Administration's covert war against Nicaragua.⁵

In late 1983, following the Attorney General's refusal to investigate alleged violations of federal law within the White House, several private citizens brought an action in federal court to compel an investigation under the Ethics in Government Act.⁶ Although the district court in *Dellums v. Smith*⁷ found that the Attorney General was compelled under the Ethics Act to conduct a preliminary investigation of

1. President George Washington's Farewell Address of September 17, 1796. See J. BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS* 379 (15th ed. 1980).

2. The 1794 Neutrality Act is presently codified in 18 U.S.C. § 960 (1982).

3. See Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L. L.J. 1 (1983).

4. *Id.* at 2.

5. *Dellums v. Smith*, 573 F. Supp. 1489 (N.D.Cal. 1983), *motion to alter judgment denied*, 577 F. Supp. 1449 (N.D.Cal. 1984), *motion to stay denied*, 577 F. Supp. 1456 (N.D.Cal. 1984), *rev'd*, 797 F.2d 817 (9th Cir. 1986).

6. 28 U.S.C. § 591 (1982).

7. *Dellums*, 573 F. Supp. at 1496.

the alleged wrongdoing,⁸ the Ninth Circuit Court of Appeals reversed, finding instead that the plaintiffs lacked standing to seek review of the Attorney General's actions.⁹ Though the plaintiffs were ultimately unsuccessful, *Dellums* foreshadowed the storm of controversy which later engulfed the Reagan presidency following public disclosure and the subsequent congressional investigation of the "Iran-Contra Affair."¹⁰

This note addresses the central issues raised in *Dellums v. Smith*; whether a federal court can review the Attorney General's non-compliance with the mandatory preliminary investigation provision of the Ethics in Government Act,¹¹ and whether criminal prosecutions under the Neutrality Act¹² may be brought against members of the Executive branch who participate in covert paramilitary operations against nations with whom the United States is at peace.

The analysis begins by reviewing the factual and procedural history of *Dellums v. Smith*, and proceeds with an analysis of the *Dellums* circuit court decision. The note points out the flaws in the circuit court's reasoning which has resulted in the impairment of the Ethics Act's effectiveness. To correct the damage, the note proposes an amendment to the Act to facilitate judicial review. Finally, the note analyzes the applicability of the Neutrality Act to executive actions, and concludes that government officials who participate in covert operations should be held criminally liable for such conduct.

II. STATEMENT OF THE CASE

In January of 1983, Congressman Ronald Dellums¹³ sent a letter to Attorney General William French Smith¹⁴ alleging that seven members of the Executive¹⁵ branch had violated federal law by their

8. *Id.*

9. *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986).

10. The "Iran-Contra Affair" involved clandestine arms sales to Iran and the subsequent transfer of proceeds to the anti-Sandinista rebels. See Comment, *The Iran-Contra Affair, the Neutrality Act, and the Statutory Definition of "At Peace"*, 27 VA. J. INT'L L. 343 (1987).

11. 28 U.S.C. § 591 (1982).

12. 18 U.S.C. § 960 (1982).

13. During the 100th Congress, Ronald Dellums represented California's 8th Congressional district in Oakland, California, and served as Chairman of the Armed Services Subcommittee on Military Construction.

14. William French Smith served as United States Attorney General under President Ronald Reagan from 1981 through 1985.

15. The plaintiffs sought to compel the Attorney General to investigate alleged violations of federal law committed by President Ronald Reagan, former Secretary of State Alexander Haig, Secretary of State George Shultz, Assistant Secretary of State Thomas Enders, Secretary

involvement in paramilitary operations against Nicaragua.¹⁶ Dellums asked the Attorney General to conduct an investigation of the alleged criminal activity.¹⁷ Two months later, Smith responded by denying Dellums' request.¹⁸

Soon thereafter, Congressman Dellums, and two other private citizens, Myrna Cunningham and Eleanor Ginsberg, brought a mandamus action in the federal district court to compel the Attorney General¹⁹ to conduct an investigation under the Ethics in Government Act which provides in pertinent part: "[t]he Attorney General shall conduct an investigation pursuant to the provisions of this chapter . . . whenever the Attorney General receives information sufficient to constitute grounds to investigate [that a designated federal official] has committed a violation of any Federal criminal law."²⁰ Although violations of several criminal statutes²¹ were asserted, the plaintiffs relied upon alleged violations of the Neutrality Act, which provides:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both.²²

The plaintiffs claimed that the named Executive officials had violated the Neutrality Act by: (1) providing at least \$19 million to finance covert paramilitary operations against Nicaragua; (2) financing

of Defense Caspar Weinberger, Assistant Secretary of Defense Nestor Sanchez, and Central Intelligence Agency Director William Casey. *Dellums v. Smith*, 797 F.2d 817, 819 (9th Cir. 1986).

16. *Id.*

17. *Id.*

18. The Attorney General stated, "[the material provided] does not constitute specific information of a federal offense sufficient to constitute grounds to investigate." *Dellums v. Smith*, 573 F. Supp. 1489, 1492 (N.D.Cal. 1983).

19. Defendants included William French Smith, individually and in his official capacity as Attorney General of the United States, and D. Lowell Jensen, individually and in his official capacity as Assistant Attorney General, Criminal Division of the United States Department of Justice. *Dellums*, 573 F. Supp. at 1489.

20. 28 U.S.C. § 591 (1982).

21. The letter alleged violations of the Neutrality Act 18 U.S.C. § 960 (1982) (prohibiting involvement in military expeditions against countries with whom the United States is at peace), 18 U.S.C. § 956 (1982) (prohibiting involvement in a conspiracy to destroy the property of a foreign government), and 18 U.S.C. § 922 (1982) (prohibiting unlicensed shipment of firearms). *Dellums*, 797 F.2d at 819.

22. 18 U.S.C. § 960 (1982).

training of various anti-Nicaraguan groups in the United States for an invasion of Nicaragua; (3) providing intelligence by the CIA to determine specific targets for the anti-Nicaraguan forces; (4) using Honduras as a base for the invasionary forces; (5) providing support to Nicaraguan and Cuban exile organizations who train and support invasionary forces on United States soil; and (6) sending hundreds of CIA officials, agents and other United States government agents to Honduras and Costa Rica to participate and assist in covert military operations against the people and government of Nicaragua.²³

A. *The District Court*

The plaintiffs did not ask the district court to declare that the President and his subordinates had violated the Neutrality Act,²⁴ because several previous courts had found that private citizens could not challenge the legality of the Administration's policies in Central America.²⁵ Instead, the plaintiffs asked only that the Attorney General be compelled under the Ethics in Government Act to investigate alleged violations of criminal law.²⁶ The plaintiffs filed a motion for summary judgment and the defendants filed a cross-motion to dismiss the complaint.²⁷

The defendants did not dispute that the information provided by the plaintiffs was sufficiently specific nor did they question the plaintiffs' credibility. Rather, the defendants argued that the court could not hear the case because: (1) the plaintiffs lacked standing to maintain the suit; (2) the case involved a "nonjusticiable political question"; and (3) the case was outside the competence of the court because it called for an advisory opinion.²⁸ In a decision by Senior District Judge Stanley A. Weigel, the court resolved all three contentions in favor of the plaintiffs and ordered the Attorney General to conduct a preliminary investigation of the alleged criminal activities within the Executive branch.²⁹

The plaintiffs' assertion of standing rested on two propositions. The plaintiffs claimed that they had presented sufficient information

23. *Dellums*, 573 F. Supp. at 1492.

24. *Id.* at 1493.

25. *See* *Crockett v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983).

26. *Dellums*, 573 F. Supp. at 1493.

27. *Id.* at 1492.

28. *Id.*

29. *Id.* at 1505.

to the Attorney General to require an investigation into whether there had been criminal wrongdoing, and that the underlying criminal acts of the Administration had directly injured them. Dellums claimed that the Attorney General's refusal to conduct a preliminary investigation had deprived him of his constitutional right as a member of Congress to vote on a declaration of war against Nicaragua.³⁰ Myrna Cunningham, a physician residing in Nicaragua, claimed that she was kidnapped and raped by United States supported anti-Sandinista, Nicaraguan rebels.³¹ In addition, Eleanor Ginsberg, a resident of Florida, claimed that paramilitary training near her home constituted a nuisance and disrupted her enjoyment of her property.³²

To resolve the question of standing, the district court applied a three-part test articulated by the Supreme Court.³³ To establish standing, the plaintiff must show: "(1) that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision."³⁴ Furthermore, when a plaintiff seeks review of an agency action, the Supreme Court requires that the interest sought to be protected by the plaintiff be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."³⁵

The court began by finding that the underlying criminal acts asserted by the plaintiffs did not create a sufficient nexus between the plaintiffs' status and the claim sought to be adjudicated to confer standing.³⁶ However, as to the plaintiffs' alternate standing argument, the court found that the defendants' refusal to conduct an investigation denied the plaintiffs' right to "aid in ensuring that violations of criminal law are not ignored because the persons accused are Administration officials."³⁷ According to the court, whether this alleged injury would implicate an interest cognizable for standing purposes depends upon the provisions of the Ethics in Government Act and the

30. *Id.* at 1491.

31. *Id.*

32. *Id.*

33. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 462, 472 (1982).

34. *Dellums*, 573 F. Supp. at 1494.

35. *See Data Processing Service v. Camp*, 397 U.S. 150, 153 (1970).

36. *Dellums*, 573 F. Supp. at 1494 n.1. The court also noted that the court's ability to redress the harm alleged under this theory was absent. *Id.*

37. *Id.* at 1494.

intent of Congress in enacting it.³⁸ The court stated: "[t]hus, the critical question is whether the Ethics in Government Act confers any procedural rights upon persons who have supplied the Attorney General with appropriate information."³⁹

To determine whether the Ethics Act conferred such a procedural right, the court cited the district court decision in *Nathan v. Attorney General*,⁴⁰ which had previously addressed this issue. The *Nathan* court found that under the Ethics Act neither the special division of the court responsible for the appointment of an independent counsel nor Congress had jurisdiction to review the Attorney General's refusal to investigate.⁴¹ Thus, the court said: "if the Act is enforceable at all it must be through those, like plaintiffs here, who have supplied specific information and pursue their application for an investigation in the District Court."⁴²

The *Dellums* court found that the *Nathan* conclusion was consistent with *City of Davis v. Coleman*,⁴³ an analogous Ninth Circuit decision. *City of Davis* involved the National Environmental Protection Act,⁴⁴ which requires federal agencies contemplating certain specified actions to prepare an Environmental Impact Statement ("EIS"). In preparation of the EIS, the agency is required to allow local authorities the opportunity to present information and comments.⁴⁵ After a federal agency failed to prepare an EIS as required by law, the city of Davis brought an action in federal court.⁴⁶ The Ninth Circuit Court of Appeals held that the deprivation of the plaintiffs' opportunity to present information and comment on the EIS constituted an injury sufficient to support standing to challenge the agency's decision. The

38. *Id.*

39. *Id.* at 1495. The court refuted the defendant's reliance on *Cort v. Ash*, 422 U.S. 66 (1975), by citing a relevant passage from *Legal Aid Society of Alameda Co. v. Brennan*, 608 F.2d 1319 (9th Cir. 1979), which stated: "[t]he reluctance of courts to imply separate private enforcement rights from statutes or regulations which provide explicitly for government enforcement procedures and penalties, [citing *Cort v. Ash*], is not applicable to such a private proceeding as this." *Dellums*, 573 F. Supp. at 1495 n.3.

40. 557 F. Supp. 1186 (D.D.C. 1983).

41. *Id.* at 1189. The court stated: "Nor does Congress have any special enforcement power; under the Act members of the Judiciary Committees of the House or Senate can only request appointment of a Special Prosecutor, and, in any event, if an Attorney General ignores his duty to investigate and report to Congress, Congress remains uninformed and cannot act." *Id.*

42. *Dellums*, 573 F. Supp. at 1495.

43. 521 F.2d 661 (9th Cir. 1975).

44. 42 U.S.C. § 4332(2)(C) (1975).

45. *Dellums*, 573 F. Supp. at 1495.

46. *Id.*

Dellums court stated that the court in *City of Davis* “found standing without reference to any explicit language in the statute or its legislative history, i.e., simply by virtue of the statutory scheme which envisioned comments by local agencies.”⁴⁷ The court concluded: “[i]n the case at bar as in *City of Davis* . . . Congress conferred upon [the plaintiffs] a right to a judicial determination.”⁴⁸

In finding that Congress created a procedural right under the Ethics Act as to individuals who supply the requisite information, the court additionally found that the plaintiffs’ claim fell within the “zone of interests” protected by the statute.⁴⁹ However, according to the court, this is not the end of the standing inquiry, because standing also requires that the court have the authority to provide for redress in the event of a favorable decision.⁵⁰ Thus, the court must be able to compel the Attorney General to conduct a preliminary investigation. The court stated: “[we] may grant this relief if (1) the decision not to conduct a preliminary investigation is subject to judicial review and (2) if the remedy of mandamus to the Attorney General is permitted.”⁵¹

To determine whether the court could review the Attorney General’s decision not to conduct a preliminary investigation, the court applied the Administrative Procedures Act (“APA”).⁵² The APA was created by Congress to facilitate judicial review of administrative actions⁵³ by incorporating a strong presumption of the right to judicial review, unless there is clear and convincing evidence that Congress intended otherwise.⁵⁴ The APA authorizes judicial review of agency actions, unless expressly precluded by statute or committed to agency discretion.⁵⁵ The court found that neither of the APA exceptions applied. The Ethics in Government Act is silent as to review of the Attorney General’s refusal to conduct a preliminary investigation, and because the Attorney General’s duty under the Ethics in Govern-

47. *Id.*

48. *Id.* at 1496.

49. *Id.* at 1497 n.7.

50. *Id.* at 1497.

51. *Id.* at 1497-98.

52. 5 U.S.C. § 702 (1982) provides: “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”

53. The Attorney General is an “agency” subject to review under the APA. See *Proietti v. Levi*, 530 F.2d 836 (9th Cir. 1976).

54. *Dellums*, 573 F. Supp. at 1498.

55. 5 U.S.C. § 701(a)(1),(2) (1982).

ment Act is "essentially [a] ministerial task . . . [it] is not the sort of unlimited discretion precluding review under the APA."⁵⁶

According to the court, a mandamus order is appropriate "[w]here federal officials have acted outside their statutory authority."⁵⁷ The court found that the defendants had failed to perform their statutory duty by refusing to conduct a preliminary investigation mandated by the Ethics in Government Act which states that the "Attorney General 'shall' conduct a preliminary investigation upon the receipt of the information, not that he 'may' do so."⁵⁸ Further, because the Attorney General's duty to conduct a preliminary investigation is essentially a ministerial task, the court stated: "mandamus is traditionally a proper remedy."⁵⁹ Finally, the court concluded that plaintiffs had standing because their "claims as framed in this action meet all of the requirements listed by the Supreme Court in *Valley Forge*."⁶⁰

The court next addressed the issue of whether the case involved a "nonjusticiable" political question.⁶¹ After citing issues identified by the Supreme Court as involving nonjusticiable political questions,⁶² the court contrasted the present case with *Crockett v. Reagan*⁶³ and *Sanchez-Espinoza v. Reagan*,⁶⁴ two cases in which federal courts had declined on political question grounds to hear cases challenging exec-

56. *Dellums*, 573 F. Supp. at 1498-99.

57. *Id.* at 1500. See also *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949).

58. *Dellums*, 573 F. Supp. at 1499.

59. *Id.* at 1500, citing *Elliot v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977), *rev'd in part on other grounds*, 442 U.S. 682 (1979).

60. *Dellums*, 573 F. Supp. at 1501.

61. *Id.* Professor Gunther states, "[the] most confined, most clearly legitimate [strand of the political question doctrine] is the 'constitutional commitment' strand. That variety of political question reflects separation of powers principles and rests on the position that the Constitution commits the final determination of some constitutional questions to agencies other than courts." G. GUNTHER, *CONSTITUTIONAL LAW* 1608 (11th ed. 1985).

62. *Baker v. Carr*, 369 U.S. 186, 217 (1962). The *Baker* Court stated:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without express lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

63. 558 F. Supp. 893 (D.D.C. 1982).

64. 568 F. Supp. 596 (D.D.C. 1983).

utive actions in Central America. In *Crockett*, members of Congress sought a declaration that military aid supplied to the government of El Salvador violated the War Powers Resolution.⁶⁵ The court held that “the factfinding necessary to resolve the issue was beyond its competence and rendered the case nonjusticiable.”⁶⁶ In *Sanchez-Espinoza*, the plaintiffs⁶⁷ sought a declaration that the President had violated the Neutrality Act and the War Powers Resolution⁶⁸ by financing and supporting paramilitary activities designed to overthrow the government of Nicaragua.⁶⁹ The court held: (1) no discoverable and manageable standards existed for resolving the dispute; (2) the dispute could not be resolved without disagreeing with another branch of government concerning the merits of the controversy; and (3) there was “danger of embarrassment to the federal government from multifarious pronouncements by different branches.”⁷⁰

Although noting factual similarities with *Crockett* and *Sanchez-Espinoza*, the *Dellums* court found that similarity does not determine the justiciability of an action.⁷¹ In contrast to *Crockett* and *Sanchez-Espinoza*, the plaintiffs in *Dellums* did not challenge any presidential action. Instead, they sought only to compel performance of the law.⁷² The *Dellums* court stated that: “[s]uch relief is unquestionably within judicial competence.”⁷³ Additionally, once the court mandates the preliminary investigation, “[a]ll subtleties of factfinding concerning events in Latin America will be left with the political branches, which are better equipped to perform those functions.”⁷⁴

However, the defendants argued that the court could not inject itself into foreign policy and that the applicability of the Neutrality Act to presidential actions should be left to the “political branches” of government to resolve.⁷⁵ The court found: “[although] courts must hesitate before entertaining questions of the President’s authority in the conduct of foreign relations . . . not every case involving foreign

65. 50 U.S.C. § 1541 (1973).

66. *Crockett*, 558 F. Supp. at 895.

67. The plaintiffs included the individuals who were plaintiffs in *Dellums*. *Dellums v. Smith*, 573 F. Supp. 1489, 1501 (N.D.Cal. 1983).

68. 50 U.S.C. § 1541 (1973).

69. *Dellums*, 573 F. Supp. at 1501.

70. *Id.*

71. *Id.* at 1502.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1501.

relations lies beyond judicial cognizance."⁷⁶ The court concluded that the issue presented was well suited for judicial resolution which would not require interference with the Executive's conduct of foreign policy. Hence, the political question doctrine did not prevent jurisdiction.⁷⁷

The court next dealt with whether the case called for an impermissible "advisory opinion."⁷⁸ The defendants claimed that a determination as to the applicability of the Neutrality Act to presidential actions was an advisory opinion. Nevertheless, the court only briefly discussed this issue and concluded that the defendants' contention was without merit.⁷⁹ The court stated: "[t]o the extent such a question is raised by this case it is presented in an adversary context, and in a form historically viewed as capable of resolution through the judicial process."⁸⁰

Finally, while noting that no material facts were in dispute,⁸¹ the court denied the defendants' motion to dismiss the complaint and granted the plaintiffs' motion for summary judgment.⁸² The court immediately granted the plaintiffs' request for an order requiring the Attorney General to conduct the preliminary investigation.⁸³

76. *Id.* at 1502.

77. *Id.*

78. *Id.* at 1503. Since 1793, when the Supreme Court declined to issue an advisory opinion requested by President Washington regarding America's neutrality toward the war between England and France, the Supreme Court has forbidden the federal courts from issuing legal advice in an attempt to secure the integrity of the judicial system. See G. GUNTHER, *supra* note 61, at 1535.

79. *Dellums*, 573 F. Supp. at 1503.

80. *Id.*

81. *Id.* The court noted:

No material facts are in dispute. Defendants agreed that:

1. Exhibits A and B to plaintiffs' statement of material facts are the documents received from plaintiffs in connection with their request for institution of a preliminary investigation pursuant to the Ethics in Government Act;
2. Exhibit C to plaintiffs' statement of material facts in the letter of March 18, 1983 to plaintiff Ronald V. Dellums from D. Lowell Jensen, Assistant Attorney General, denying plaintiffs' request;
3. No preliminary investigation was undertaken and no recommendation for appointment of an independent counsel was submitted;
4. Paragraph 3 of plaintiffs' statement of material facts contains an accurate reproduction of allegations received from plaintiffs in connection with their request to the Attorney General under the Ethics in Government Act.

Id.

82. *Id.* at 1505.

83. *Id.* The court ordered the Attorney General to conduct a preliminary investigation into the conduct of any persons covered by the Ethics Act named in the information submitted by the plaintiffs relating to violations of the Neutrality Act arising out of actions connected to paramilitary expeditions against Nicaragua. In addition, if the Attorney General failed to conduct such an investigation within ninety days of the date of the order, he would be compelled

The defendants then filed a motion to alter judgment.⁸⁴ In support of their motion, the defendants claimed that the Neutrality Act did not apply to any action authorized by the President and that a preliminary investigation was not required because the Justice Department had established a policy not to prosecute Executive officials for violations of the Neutrality Act.⁸⁵ As to the first argument, the court found that the relevant consideration was whether the Act includes the activities alleged by plaintiffs.⁸⁶ After a lengthy analysis of the Neutrality Act's history and application, the court held that the Neutrality Act reasonably included the activities alleged by plaintiffs.⁸⁷ Similarly, the court was not swayed by the defendants' second argument. The court found that under the Ethics in Government Act, a Justice Department policy of non-prosecution may be taken into account only when making a determination whether to apply for independent counsel, not when deciding whether to conduct a preliminary investigation.⁸⁸

In denying the defendants' motion to alter judgment, the court stated: "[i]f the extensive information plaintiffs have laid before the Attorney General should turn out 'upon proper investigation' to show violations of the Neutrality Act, there is danger that, unless the violations be terminated, the nation may be involved in a war not declared by Congress."⁸⁹

In the alternative, the defendants moved for stay of judgment pending appeal.⁹⁰ In evaluating the defendants' motion to stay, the court applied the three-part test established in *Warm Springs Dam Task Force v. Gribble*:⁹¹ (1) Did the moving party establish a strong likelihood of success on the merits; (2) Does the balance of irreparable harm favor the moving party; and (3) Is the public interest served by the grant of the injunction. Finding the motion to stay was merely a

to apply for the appointment of an independent counsel as provided in 28 U.S.C. § 592(c)(1) (1982). *Id.*

84. *Dellums v. Smith*, 577 F. Supp. 1449 (N.D. Cal. 1984).

85. *Id.* at 1451.

86. *Id.* at 1452.

87. *Id.*

88. *Id.* at 1455. The court noted that consideration of an established policy of non-prosecution was permitted to ensure that Government officials would not be targeted in an investigation where private citizens would escape prosecution. *Id.*

89. *Id.* at 1456.

90. *Dellums v. Smith*, 577 F. Supp. 1456 (N.D. Cal. 1984).

91. 565 F.2d 549, 551 (9th Cir. 1977).

repetition of contentions decided adversely to them⁹² the court established that it was not likely the defendants would be successful on appeal.⁹³ The court also rejected the defendants' claim that irreparable harm would result because the case could become moot if they proceeded with an investigation, forcing them to utilize scarce investigatory resources.⁹⁴ The court found mootness was not a proper consideration in a stay motion, and the limited use of resources for a preliminary investigation was not a concern where the court simply ordered compliance with a statute.⁹⁵ Finally, the court noted that the Attorney General's failure to act damaged the public interest which would be further compromised by granting a stay.⁹⁶ The court accordingly denied the defendants' motion to stay pending appeal.⁹⁷

B. *The Ninth Circuit Court of Appeals*

On appeal to the Ninth Circuit Court of Appeals, Judge Betty B. Fletcher, writing for an unanimous court,⁹⁸ held that although the Ethics in Government Act imposed an affirmative duty upon the Attorney General to conduct a preliminary investigation, these plaintiffs lacked standing to complain that the Attorney General failed to discharge that duty.⁹⁹ Hence, the plaintiffs could not seek a mandamus order to compel the Attorney General to conduct the preliminary investigation. Accordingly, the court refused to reach the issue of the Neutrality Act's applicability to executive actions.¹⁰⁰

The court began its review of the district court's decision by citing *Nathan v. Smith*¹⁰¹ and *Banzhaf v. Smith*,¹⁰² in which the District of Columbia Circuit Court of Appeals declined, on two occasions, to

92. *Dellums*, 577 F. Supp. at 1457.

93. *Id.* at 1458.

94. *Id.*

95. *Id.*

96. *Id.* at 1459.

97. *Id.*

98. The case was heard before a three judge panel consisting of Hon. Thomas E. Fairchild, Hon. William Cameron Canby Jr., and Hon. Betty B. Fletcher.

99. *Dellum v. Smith*, 797 F.2d 819 (9th Cir. 1986).

100. *Id.* at 820.

101. *Nathan v. Attorney General of the United States*, 557 F. Supp. 1186 (D.D.C. 1983), *order granted*, 563 F. Supp. 815 (D.D.C. 1983), *rev'd sub nom.* *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984). *Nathan* was brought on behalf of individuals killed or wounded at a 1979 Greensboro, North Carolina parade sponsored by the Communist Workers' Party. During the parade, members of the Ku Klux Klan and American Nazi Party made an armed assault upon the marchers resulting in death and injury. The plaintiffs claimed that certain Executive officials authorized or negligently permitted the attack and conspired to conceal their involvement. Although the district court found for the plaintiffs, *Nathan*, 557 F. Supp. at 1190, the

review the Attorney General's refusal to conduct a preliminary investigation under the Ethics in Government Act.¹⁰³ The court then noted that, although the Attorney General was under a mandatory duty to conduct an investigation, the court's inquiry was a narrow one. The court stated, "we must decide whether the Attorney General's statutory duty to conduct a preliminary investigation may be enforced by this court at the behest of these particular plaintiffs."¹⁰⁴

The court noted that although members of the public generally do not have standing to complain when the government violates the law, Congress may create procedural rights, which if violated constitute injury-in-fact sufficient to satisfy the standing requirement.¹⁰⁵ The district court bypassed entirely the injury-in-fact inquiry when it reasoned that Congress' imposition of a mandatory duty to conduct a preliminary investigation created a correlative procedural right to have the allegations investigated.¹⁰⁶ In citing *Alvarez v. Longboy*,¹⁰⁷ the court stated that procedural rights must be premised on evidence in the statutory language, purpose, or legislative history that Congress intended to create such a right.¹⁰⁸

After finding that the district court failed to make an inquiry into the Ethics in Government Act's language, purpose, and legislative history, the circuit court proceeded with its own inquiry. It began by noting that the language of the Act is silent as to procedural rights vested in members of the public.¹⁰⁹ The court reasoned that rather than establishing procedural rights in the public, Congress provided

District of Columbia Circuit Court of Appeals reversed in an order containing no rationale. *Nathan*, 737 F.2d at 1070. Circuit Judges Davis and Bork filed separate concurring opinions.

102. *Banzhaf v. Smith*, 588 F. Supp. 1489 (D.D.C. 1984), *judgment entered*, 588 F. Supp. 1498 (D.D.C. 1984), *vacated per curiam*, 737 F.2d 1167 (D.C. Cir. 1984). In *Banzhaf*, private citizens brought an action to compel appointment of independent counsel to investigate alleged violations of criminal law (including, *inter alia*, interference with nomination or election of a candidate for the office of President (18 U.S.C. § 595 (1982)) and theft of records of the United States (18 U.S.C. §§ 641, 654, 661 (1982))) in the transmittal of campaign briefing materials from the Carter White House to the Reagan presidential campaign. Although the district court found it had the authority to enforce the congressionally created statutory duty under the Ethics Act, *Banzhaf*, 588 F. Supp. at 1494, the en banc District of Columbia Circuit Court of Appeals reversed, finding instead that the court could not review the Attorney General's refusal to conduct a preliminary investigation. *Banzhaf*, 737 F.2d at 1167-68.

103. *Dellums*, 797 F.2d at 818-19.

104. *Id.* at 821.

105. *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 755 (1984)).

106. *Dellums*, 797 F.2d at 821.

107. 697 F.2d 1333 (9th Cir. 1983).

108. *Dellums*, 797 F.2d at 821.

109. *Id.*

for congressional review through the Judiciary Committees of both houses of Congress.¹¹⁰ Further, the court noted that the Act neither compels notice of a preliminary investigation nor compels notice when the Attorney General seeks appointment of independent counsel to those who provide the information.¹¹¹

The court then turned to the purpose and legislative history of the Act.¹¹² The court began by noting the plaintiffs' contention that it would eviscerate the Act if the Attorney General could simply refuse to comply with its provisions.¹¹³ In particular, the plaintiffs pointed out that Congress intended to prevent the Attorney General from circumventing the Act.¹¹⁴ The court stated, "[p]laintiffs have failed to persuade us, however, that the Ethics Act will be wholly unenforceable unless we ascribe to Congress the purpose to confer procedural rights on private citizens."¹¹⁵

Finally, the court noted that although the Supreme Court found a strong presumption favoring reviewability under the Administrative Procedures Act, "[t]he presumption may be overcome by specific language or specific legislative history, reliably indicating intent to preclude review, or by inferences of intent drawn from the statutory scheme as a whole."¹¹⁶ The court argued that the Ethics in Government Act precluded review at the behest of the public by granting congressional oversight through the Judiciary Committees.¹¹⁷ In concluding the court stated, "[w]e are persuaded that Congress did not intend thereby to establish procedural rights in the public. Rather it envisioned that enforcement by members of congressional judiciary committees would be effective in preventing the Attorney General from refusing to obey the law."¹¹⁸ The court then reversed the district court's ruling and dismissed the case.¹¹⁹

110. *Id.* at 822. 28 U.S.C. § 595(e) (1982) provides: "[a] majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of Congress may request in writing that the Attorney General apply for the appointment of a[n] independent counsel."

111. *Dellums*, 797 F.2d at 822.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 823.

118. *Id.*

119. *Id.*

III. ANALYSIS

A. *The Ethics in Government Act*

The 1978 Ethics in Government Act was created in the wake of Watergate¹²⁰ and other episodes of criminal wrongdoing committed by high level Executive branch officials.¹²¹ The Act was passed by Congress to eliminate actual or perceived conflicts of interest involving Department of Justice prosecutions of Executive branch officials.¹²² Any lingering doubts as to the Ethics in Government Act's constitutionality has been put to rest by the recent Supreme Court decision in *Morrison v. Olson*.¹²³

Both the *Dellums* district court¹²⁴ and circuit court,¹²⁵ agreed that the Attorney General was *required* to conduct a preliminary investigation when he received specific and credible information¹²⁶ pertaining to criminal wrongdoing within the Executive branch.¹²⁷ However, the courts differed on the question as to whether the Ethics

120. A recent Senate Report on the Ethics Act stated:

A primary impetus for the independent counsel statute was the 1973 order by President Nixon to the Department of Justice to fire Archibald Cox, a "special prosecutor" who had been appointed by the President from outside the government to investigate the criminal allegations known as Watergate involving such officials as the President's Chief of Staff and Attorney General.

The order to fire Mr. Cox apparently arose from his refusal to obey earlier Presidential directives that he halt his efforts to obtain tape recordings and other records in the President's possession. Elliot Richardson, then Attorney General, and William Ruckelshaus, then Deputy Attorney General, resigned rather than fire Mr. Cox; Robert Bork, then Solicitor General, issued the desired order. The abrupt departure of Messrs. Cox, Richardson, and Ruckelshaus from the Department of Justice was later described by the press as the "Saturday Night Massacre."

INDEPENDENT COUNSEL REAUTHORIZATION ACT OF 1987, S.REP. NO. 123, 100th Cong., 1st Sess. 3 (1987).

121. President Jimmy Carter expressed the need for such an Act in a speech to Congress in May of 1977. SPEECH BY PRESIDENT JIMMY CARTER, I PUB. PAPERS 786 (May 3, 1977).

122. See SPECIAL PROSECUTOR ACT OF 1978: REPORT FROM THE COMMITTEE ON THE JUDICIARY, H.REP. NO. 1307, 95th Cong., 2nd Sess. at 252 (1978).

123. *Morrison v. Olson*, 108 S.Ct. 2597 (1988), Scalia J. dissenting. In a lopsided 7-1 decision, Chief Justice Rehnquist, writing for the Court, held that the Ethics in Government Act's independent counsel provision is constitutional and does not impermissibly infringe upon the separation of powers. However, the Court did not address the question presented in this note.

124. *Dellums v. Smith*, 573 F. Supp. 1489, 1505 (N.D.Cal. 1983).

125. *Dellums v. Smith*, 797 F.2d 817, 819 (9th Cir. 1986).

126. For the purposes of this analysis, we will assume that the information provided by the plaintiffs was sufficiently credible and specific within the meaning of the Ethics in Government Act to trigger a preliminary investigation.

127. 18 U.S.C. § 592(a)(2) (1986) states: "In conducting preliminary investigations pursuant to this section, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas."

in Government Act conferred procedural rights upon private citizens to compel an investigation when the Attorney General fails to carry out his duty under the Act.¹²⁸

Although both the district court and circuit court claimed to apply the same standards to the question of standing under the Ethics in Government Act, the actual application of the law and conclusions were strikingly different. To infer standing upon the plaintiffs, the district court primarily relied upon the underlying purpose of the Ethics Act,¹²⁹ the application of the Administrative Procedures Act,¹³⁰ and cases interpreting other Acts in which Congress failed to provide for judicial review.¹³¹ In contrast, the circuit court relied upon an analysis of the Ethics Act's language, purpose and legislative history to conclude that the plaintiffs could not seek judicial review.¹³²

Although the circuit court is correct that Congress did not expressly provide for judicial review under the Ethics Act, this fact alone should not be read as an intent to preclude review. In *Sierra Club v. Peterson*,¹³³ the Ninth Circuit specifically stated that Congress' failure to adopt a provision providing for review at the behest of private citizens "is *not* an indication of congressional intent to prohibit such suits."¹³⁴ In fact, as it did in another provision of the Act,¹³⁵ Congress was perfectly capable of providing language which would have specifically prohibited judicial review, but it chose instead not to do so. Indeed, in *County of Alameda v. Weinberger*¹³⁶ the court held that, "[review] shall not be deemed foreclosed unless Congress has forbidden review in unmistakable terms."¹³⁷

The *Dellums* circuit court found that intent to preclude judicial review could be discerned from § 595(e) of the Ethics Act, which

128. Although a preliminary investigation is mandated under the Ethics Act, once the investigation is completed, the Attorney General may choose not to apply for an independent counsel if he concludes there are no reasonable grounds to believe that further investigation or prosecution is warranted. See 28 U.S.C. § 592(a)(1) (1982).

129. *Dellums v. Smith*, 573 F. Supp. 1489, 1493 (N.D.Cal. 1983).

130. 5 U.S.C. § 701 (1982).

131. See *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Nathan v. Attorney General*, 557 F. Supp. at 1186 (D.D.C. 1983).

132. *Dellums v. Smith*, 797 F.2d 817, 821 (9th Cir. 1986).

133. 705 F.2d 1475 (9th Cir. 1983).

134. *Id.* at 1479 (emphasis added).

135. Under the Ethics Act, the Attorney General's decision to apply for independent counsel after completion of the preliminary investigation is specifically *not* reviewable by the federal courts. 28 U.S.C. § 592(f) (1982).

136. 520 F.2d 344 (9th Cir. 1975).

137. *Id.* at 348.

grants oversight to the Judiciary Committees of Congress. The court stated, “[c]entral to our analysis is the Ethics Act’s provision for oversight of the Attorney General’s compliance with the Ethics Act by members of the congressional judiciary committees, not the public.”¹³⁸ However, the provision of the Ethics Act which grants congressional oversight does not provide any enforcement mechanism. Under the Act, Congress cannot require the Attorney General to conduct a preliminary investigation nor require the Attorney General to request appointment of an independent counsel.¹³⁹ Indeed, the weakness of the congressional oversight provision was demonstrated in the midst of the *Dellums* litigation when the Attorney General rejected a request by the majority of the Democratic members of the House Judiciary Committee to conduct a preliminary investigation into Dellums’ allegations.¹⁴⁰

In response to the plaintiffs’ argument that congressional oversight is not a meaningful remedy in that Congress will seldom invoke its provisions, the Court of Appeals found, “[t]he anticipated infrequency of such a request does not make the oversight authority meaningless. The Attorney General’s flouting of the law he is sworn to uphold is not, in the normal course of things, the sort of event that we would anticipate required frequent correction.”¹⁴¹ Nevertheless, Congress reached a far different conclusion. The Senate report on the Independent Counsel Reauthorization Act of 1987 concluded that between 1982 and 1987, the Justice Department processed thirty-six cases under the Ethics Act.¹⁴² Of these original thirty-six, the Justice Department reportedly closed twenty-five prior to conducting the preliminary investigation specified in the law.¹⁴³ The Justice Department claimed that fifteen of the cases were closed because (1) the information provided allegedly involved a federal official not covered by the Act or (2) the information lacked specificity or credibility.¹⁴⁴ How-

138. *Dellums v. Smith*, 797 F.2d 817, 823 (9th Cir. 1986).

139. In *Morrison v. Olson*, 108 S. Ct. 2597 (1988), the Supreme Court pointed out that “the [Ethics] Act does empower certain members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit.” *Id.* at 2620-21.

140. See Brief for the Appellees at Addendum B, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (No. 84-1525).

141. *Dellums*, 797 F.2d at 823 n.4.

142. INDEPENDENT COUNSEL REAUTHORIZATION ACT OF 1987, S. REP. NO. 123, 100th Cong., 1st Sess. 6-7 (1987).

143. *Id.*

144. *Id.*

ever, of the remaining ten cases, the Justice Department claimed that the evidence did not establish a crime, or there was insufficient evidence of a subjects criminal intent and therefore no crime to investigate.¹⁴⁵ The Senate report concluded: "[t]hus, contrary to the statutory standard, in 50% of the cases handled by the Justice Department since 1982 in which it declined to conduct a preliminary investigation of a covered official, it relied on factors other than credibility and specificity to evaluate the case."¹⁴⁶

The circuit court in *Dellums* noted that during the 1981 hearings on the reauthorization of the Ethics in Government Act, the Justice Department sought repeal of the Act, or alternatively, an amendment vesting sole discretion in the Attorney General to appoint or remove the independent counsel.¹⁴⁷ Congress rejected these proposals,¹⁴⁸ knowing that such an amendment would defeat the purpose of the Act—to establish a procedure for resolving the conflict of interest which inevitably results when the Attorney General is called upon to pursue allegations of wrongdoing against close political associates.¹⁴⁹ Although the Attorney General was unsuccessful in persuading Congress to vest in him the power to appoint the independent counsel, the decision in *Dellums* does exactly that. The decision grants sole discretion to the Attorney General by eliminating judicial review, the only effective enforcement mechanism.¹⁵⁰

Following the circuit court decisions in *Nathan*,¹⁵¹ *Banzhaf*,¹⁵² and *Dellums*,¹⁵³ it is highly unlikely that a federal court would permit

145. *Id.*

146. *Id.*

147. *Dellums v. Smith*, 797 F.2d 817, 820 (9th Cir. 1986).

148. *Id.* Congress did, however, amend the Ethics Act to (1) limit the range of individuals subject to investigation; (2) permit the Attorney General to consider the credibility of the source of the information provided before undertaking a preliminary investigation; (3) raise the standard for appointment of a special prosecutor from one requiring appointment unless the allegations were wholly unsubstantiated to one requiring appointment unless there were no reasonable grounds to believe further investigation was warranted; and (4) change the name "special prosecutor" to "independent counsel". *Id.* at 820-21.

149. See ETHICS IN GOVERNMENT ACT AMENDMENTS OF 1982: HEARINGS ON S. 2059 BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, S.REP. NO. 2059, 97th Cong., 2d Sess. 5-7 (1981).

150. The only remaining incentive for the Attorney General to comply with the Ethics Act is the threat of congressional impeachment. However, it is highly doubtful that Congress would ever have the will to impeach an Attorney General for failing to comply with the Act.

151. *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984).

152. *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984).

153. *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986).

a private citizen to challenge the Attorney General's refusal to conduct a preliminary investigation in compliance with the Ethics Act.¹⁵⁴ However, Congress has the authority to remedy this unfortunate situation by amending the Ethics Act to expressly provide for judicial review of the Attorney General's failure to conduct a preliminary investigation.¹⁵⁵

Although there are several ways to codify judicial review under the Ethics Act,¹⁵⁶ the most feasible approach was established by the *Dellums* district court.¹⁵⁷ Under this formulation, the scope of the review would be a narrow one. The designated court would simply determine whether the Attorney General had fulfilled his duty to conduct a preliminary investigation. If it found that the Attorney General had failed to fulfill that duty, the court would order the Attorney General to investigate or appoint an independent counsel. Such an approach would "ensure that no one, however high or important a position he holds in the executive branch, is insulated from the investigation called for by the provisions of the Ethics in Government Act."¹⁵⁸

B. *The Neutrality Act*

Because the *Dellums* circuit court held that the plaintiffs lacked standing to seek review, it did not reach the question of the Neutrality Act's applicability to executive actions.¹⁵⁹ However, the district court, which noted that the plaintiffs were *not* required to show

154. The Supreme Court has never granted review of an Attorney General's failure to comply with the provisions of the Ethics Act. Following *Dellums*, the district court in *Beauchamp v. Meese*, 657 F. Supp. 1263 (N.D.Ill. 1987), stated: "[i]t is unnecessary to decide whether *Beauchamp* provided the Attorney General with credible and specific information about wrongdoing . . . or whether § 592(a)(1) requires the Attorney General to investigate credible and specific allegations of criminal wrongdoing, because no private right of action exists to enforce such a requirement." *Beauchamp*, 657 F. Supp. at 1264 (footnote omitted).

155. A recent commentator stated, "[a] helpful analogy can be drawn to statutes that allow private litigants in the antitrust field to bring actions for treble damages. Such legislation has proved to be extremely effective, leading some to believe that the . . . procedure could be utilized successfully in the independent counsel area as well." Comment, *The Ethics in Government Act of 1978: Problems with the Attorney General's Discretion and Proposals for Reform*, 1985 DUKE L.J. 497, 512.

156. For a thorough analysis of other proposals to prevent the Attorney General from "short-circuiting the independent counsel mechanism" see Comment, *supra* note 155.

157. *Dellums v. Smith*, 573 F. Supp. 1489 (N.D.Cal. 1983).

158. *Id.* at 1493.

159. The *Dellums* circuit court stated: "[b]ecause we find that the district court erred in exercising jurisdiction over this suit, we do not reach the merits of the court's ruling on the Neutrality Act." *Dellums v. Smith*, 797 F.2d 817, 820 (9th Cir. 1986).

that "all legal elements of [the] crime exist[ed]" in order to trigger an investigation,¹⁶⁰ held that the Attorney General was compelled to conduct an investigation if "the view [was] *reasonable* that the Neutrality Act proscribes the activities alleged by plaintiffs."¹⁶¹ Had the circuit court reached the question of the Neutrality Act's applicability, it could have reasonably concluded that the Neutrality Act applied to Executive officials who participate in actions against nations with whom the United States is at peace.

The Attorney General, in his appellate brief, argued that the Neutrality Act does not reach the conduct of government officials acting pursuant to official government policy.¹⁶² He claimed that the Act "proscribes individual conduct, not government activities."¹⁶³ This argument fails under close scrutiny. A review of the Neutrality Act's language, purpose and history reveals that Congress intended the Act to apply to Executive officials.

The language of the Neutrality Act does not exclude any government officials from its reach.¹⁶⁴ In contrast, the contemporaneous Logan Act,¹⁶⁵ which prohibits private communications with foreign governments, expressly excludes actions taken with government approval.¹⁶⁶ Thus, the Logan Act indicates congressional familiarity with such an exception and its intent not to include an exception for executive action within the Neutrality Act.¹⁶⁷ Secondly, as noted by

160. *Dellums v. Smith*, 577 F. Supp. 1449, 1550 (N.D.Cal. 1984).

161. *Id.* at 1551 (emphasis added).

162. Brief of the Appellants at 31, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (No. 84-1525). The defendants stated: "[b]ased upon reasonable legal judgment and the overwhelming evidence of congressional intent, the Attorney General has concluded that plaintiffs' allegations, even if true, simply do not constitute a federal crime—namely, that [the Neutrality Act] does not proscribe acts taken in pursuit of official governmental policy." *Id.*

163. *Id.* at 32. *Cf.* *United States v. Cooper Corp.*, 312 U.S. 600 (1941); *Wilson v. Omaha Indian Tribes*, 442 U.S. 653 (1979); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *United States v. United Mine Workers*, 330 U.S. 258 (1947).

164. The Neutrality Act states:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both.

18 U.S.C. § 960 (1982).

165. 18 U.S.C. § 953 (1982).

166. 18 U.S.C. § 953 (1982) states in part: "Any citizen of the United States, wherever he may be, who, without authority of the United States. . . ." *Id.*

167. *See* 18 U.S.C. § 951 (1982) which states in pertinent part: "[w]hoever other than a diplomatic or consular officer or attache. . . ." *Id.*

plaintiffs, although the original drafters of the Neutrality Act copied prior English law, "Congress specifically deleted the provision in the English law which provided that such activity was a crime only when done 'without leave or license of his Majesty.'"¹⁶⁸ Thus, Congress impliedly intended the Act to apply to any person under the jurisdiction of the United States, including government officials.

The Attorney General argued that "Congress sought not to restrict executive prerogatives under Article II [of the Constitution], but to support the Executive by criminalizing acts of individuals that threatened to interfere with the government's conduct of foreign policy."¹⁶⁹ A review of the Neutrality Act's purpose results in a contrary conclusion.¹⁷⁰ Congress passed the Neutrality Act following President Washington's "Executive Neutrality Proclamation" issued in April of 1793.¹⁷¹ Although the immediate explanation for the adoption of the Neutrality Act involved the growing fear that the United States might become entangled in the french revolution,¹⁷² a more thorough analysis reveals that Congress approved the Act to prevent "unchecked hostile expeditions [which] would have amounted to private usurpation of the public power, vested in Congress, to declare war and issue letters of marque and reprisal."¹⁷³ Indeed, far from

168. Brief for the Appellees at 29, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (No. 84-1525). The plaintiffs stated, "It is clear that the reason for this deletion rested in the American Constitutional framework, which, unlike the English, gave to the Legislature and not the Executive the power of raising armies, issuing letters of marque and reprisal and declaring war." *Id.* at 29 n.27.

169. Brief for the Appellants at 35, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (No. 84-1525). The Attorney General concluded, "[f]ar from circumscribing executive authority, the Neutrality Act was proposed by the Executive to strengthen the executive." *Id.* at 36.

170. Although Congress did intend to strengthen the sovereign's power through the Neutrality Act, the Attorney General's analysis is fatally flawed in that he equates the President with the sovereign. The plaintiffs state, "[b]ut the drafters of the Constitution and Neutrality Act all understood that the sovereign authority to declare war and initiate inferior hostilities was not a presidential prerogative but a congressional one." Brief for the Appellees at 32, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (No. 84-1525).

171. Comment, *Non-enforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 HARV. L. REV. 1955, 1961 (1982).

172. Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1, 11 (1983).

173. Comment, *Non-enforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 HARV. L. REV. 1955, 1965 (1982). Secretary of State Thomas Jefferson stated:

If one citizen has a right to go to war of his own authority, every citizen has the same. If every citizen has that right, then the nation (which is composed of all its citizens) has a right to go to war, by the authority of its individual citizens. But this is not true either on the general principles of society, or by our Constitution, which gives that power to Congress alone and not citizens individually.

strengthening executive authority, as contended by the Attorney General, the Neutrality Act "restricts executive discretion to overlook violations of international law and guards Congress' own role in foreign affairs."¹⁷⁴

The history of the Neutrality Act confirms that the Act applies to executive actions. Prior to *Dellums*, no President had ever asserted that the Neutrality Act did not apply to Executive officials.¹⁷⁵ Similarly, congressional amendments to the Neutrality Act, offered by Senator Slidell in 1854 and 1858 to allow the President to suspend the Act's operation at his discretion, confirms that Congress also believed that Executive officials were bound by the Act.¹⁷⁶ The Slidell proposals, which were intended to allow private expeditions against the Spanish colonial government in Cuba, failed to gain the necessary votes and died.¹⁷⁷ The *Dellums* district court noted, "[t]he failure of Senator Slidell's proposed amendments fortifies the view that the Neutrality Act grants no executive discretion to authorize paramilitary expeditions against foreign governments with which this nation is not at war."¹⁷⁸

The first prosecution under the newly enacted Neutrality Act was the so-called Smith and Ogden trial in 1806.¹⁷⁹ Colonel William S. Smith and Samuel Ogden were tried in federal court for their involvement in a plot to attack Spanish forts in South America in the hopes of triggering a widespread revolt against Spanish rule.¹⁸⁰ In their defense, Smith and Ogden claimed that their actions had been

Brief for the Appellees at 30, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (No. 84-1525).

174. Comment, *Non-enforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 HARV. L. REV. 1955, 1964 (1982).

175. Brief for the Appellees at 37, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (No. 84-1525).

176. *Dellums v. Smith*, 577 F. Supp. 1449, 1453 (N.D.Cal. 1984). Under the proposed amendments, suspension of the Neutrality Act could only be made during congressional recesses. *Id.*

177. *Id.*

178. *Id.* Similarly, a recent commentator stated: "[t]hat the waiver was considered necessary demonstrates that the executive never enjoyed such powers of abrogation in the first place." Comment, *The Iran-Contra Affair, the Neutrality Act, and the Statutory Definition of "At Peace"*, 27 VA. J. INT'L L. 343, 352 (1987).

179. *United States v. Smith and Ogden*, 27 F. Cas. 1186, 1192 (C.C.D. N.Y. 1806) (Nos. 16341a, 16342, 16342a, 16342b).

180. See Reinstein, *An Early View of Executive Powers And Privilege: The Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309 (1975). Smith and Ogden were persuaded by Francisco de Miranda, a native of Venezuela, to participate in the expedition which was later defeated when Miranda's ship was intercepted by the Spaniards. *Id.* at 312.

authorized by President Jefferson and his cabinet.¹⁸¹ The trial court, presided over by Supreme Court Justice William Paterson,¹⁸² held that neither the Neutrality Act nor the Constitution creates any exceptions for the President or his Cabinet.¹⁸³ Justice Paterson stated that, “[t]he President of the United States cannot control the [Neutrality] statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure.”¹⁸⁴

The Attorney General attempted to prevent the application of the Neutrality Act to executive actions by citing prior presidential participation in military actions without the formal consent of Congress.¹⁸⁵ Were these actions in violation of the Neutrality Act? The *Dellums* district court drew a distinction between actions involving regular United States troops and those involving private forces.¹⁸⁶ Indeed, one commentator has stated, “the legislative history of the [Neutrality] statute indicates that its purpose was to prevent expeditions of private persons whether or not authorized by the Executive, and not [to prevent] the use of regular United States forces.”¹⁸⁷

For most of its history, violations of the Neutrality Act have been vigorously prosecuted by the government.¹⁸⁸ In fact, not only have previous Administrations rigorously enforced the Act, but all prior Presidents have considered themselves bound by its restrictions. Further, the language, purpose, and history of the Neutrality Act in-

181. To substantiate their claims, the defendants sought to compel the testimony of Secretary of State Madison and his subordinates. The court rejected the request ruling that any possible testimony by Madison or the other named officials would be irrelevant to any possible defense. Comment, *The Iran-Contra Affair, the Neutrality Act, and the Statutory Definition of "At Peace"*, 27 VA. J. INT'L L. 343, 354 (1987).

182. Justice Paterson was also a participant at the constitutional convention. Brief for the Appellees at 34, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (No. 84-1525).

183. *Id.*

184. Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L. L.J. 1, 36 (1983). Similarly, Justice Paterson found that the Constitution “which measures out the powers and defines the duties of the President, does not vest in him any authority to set on foot a military expedition against a nation with which the United States is at peace.” Brief for the Appellees at 34, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (No. 84-1525).

185. Brief for the Appellants at 38-39, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (No. 84-1525).

186. *Dellums v. Smith*, 577 F. Supp. 1449, 1453 (N.D.Cal. 1984).

187. Lobel, *supra* note 184, at 31 n.159.

188. Between the years 1795 and 1925 there were thirty-four reported prosecutions for violations of the Neutrality Act, one every four years. Lobel, *supra* note 184, at 43.

dicates that the Act applies to Executive officials who participate in paramilitary actions against foreign nations. Executive officials who participate in paramilitary actions should not be exempt from the Neutrality Act's reach merely because the Attorney General, the nation's chief law enforcement officer, has chosen to ignore the law.¹⁸⁹

IV. CONCLUSION

The plaintiffs in *Dellums v. Smith* attempted to force an investigation into the actions of an Administration bent on conducting a covert war in Central America without the express consent of Congress. The plaintiffs were ultimately unsuccessful because the circuit court found that the Ethics in Government Act does not contain a private right of action to enforce compliance with the law. This note has argued for a congressional amendment to the Ethics Act which would authorize judicial review. Furthermore, this note has addressed the applicability of the Neutrality Act to Executive officials and has argued that such an application is consistent with the language, history and purpose of the Act.

Congress enacted the Ethics in Government Act to prevent conflicts of interest which result when the Attorney General is called upon to investigate criminal activity within the Executive branch. Similarly, Congress enacted the Neutrality Act to place restrictions upon executive discretion in the enforcement of international law and to guard against usurpation of Congress' war powers. Although separated by nearly 200 years of lawmaking, both the Ethics in Government Act and the Neutrality Act involve congressional attempts to place limits upon executive power and to remedy subtle flaws in the Constitutional framework. Unfortunately, the noble objectives of these Acts have not been fully realized.

Daniel L. Germain

189. Alexander Hamilton stated:

Government is frequently and aptly classed under two descriptions—a government of *force*, and a government of *laws*; the first is the definition of despotism—the last, of liberty. But how can a government of laws exist when the laws are disrespected and disobeyed? Government supposes control. It is that *power* by which individuals in society are kept from doing injury to each other, and are brought to co-operate to a common end. The instruments by which it must act are either the *authority* of the laws or *force*. If the first be destroyed, the last must be substituted; and where this becomes the ordinary instrument of government, there is an end to liberty.

A. MASON, *FREE GOVERNMENT IN THE MAKING* 353 (11th printing, 1981).