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A Duty To Defend The Law

Barely one week before briefs were due in the recent D.C. Circuit Court test of the 1974 Federal Election Campaign Act, the Federal Election Commission, which enforces this new law, almost lost its lawyer. Its lawyer was the U.S. Attorney General, Edward H. Levi, and through him the Department of Justice. Through a telephone call from the Associated Press, the commission learned that the department might withdraw from defense of the campaign finance controls in the new law; indeed, the department might switch sides and attack the reforms.

The reason, it appeared, was that the law disturbed Levi's personal jurisprudential convictions, as well as the views of Solicitor General Robert H. Bork. Both these former law professors, trained in the *laissez-faire* legal philosophy of the University of Chicago, felt that curbs on political giving and spending threaten the First Amendment's guarantee of free expression.

When Commission Chairman Thomas Curtis sought help from the White House, Levi made a partial retreat. On May 30, he announced through a carefully drafted release that the "Civil Division" of the department would file its brief supporting the campaign finance controls on June 2, when briefs were due in the Court of Appeals. However, the release added, when the case reaches the Supreme Court, the "Department" has the "intention" of dropping its advocate's pose and filing an "amicus curiae" brief setting out arguments for, and against, the validity of the law.

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Concerned that anything less than total commitment from Justice would look to the court like an attack, Curtis was unappeased by the "amicus curiae" proposal. On June 5 he urged the Attorney General to reconsider his "departure from the Department's tradition of supporting the adversary process as an advocate when a law of the United States is at stake." Four days later, on June 9, he wrote identical protests to President Ford, House Speaker Carl Albert, and Senate President Pro Tem James Eastland. He called the proposal "less than an adequate defense," pointedly adding that Levi's public announcement long before the case reached the Supreme Court was "premature and damaging to the suit" in the Court of Appeals.

While Curtis drafted these pleas for continued representation, Levi opened a new front in his apparent campaign to free Justice from the duty to profess full support for federal laws under court challenge. On June 5 before the Senate Commerce Committee he disavowed another major congressional enactment—the Clean Air Act of 1970, which requires the states to implement federal air quality standards. In a prepared statement, Levi told the committee that basic principles of federalism are impaired by statutory requirements which obligate state officials to enforce federal laws, as Con-

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gress provided in the Clean Air Act.

Levi specifically dismissed as "insidious" the rationale of a decision upholding the act, which Justice Department lawyers had recently won from the Third Circuit Court of Appeals. While he declined to say expressly that the Clean Air Act is unconstitutional, that conclusion is the natural inference from his criticism.

Although unnoticed by the press, the Attorney General's doubts about the Clean Air Act could prove at least as damaging as the wrangle over the campaign act will be to that law. Especially since his remarks on the clean air question are spread formally on the record of a congressional hearing, they will be gleefully underscored by lawyers challenging the statute before the Court, regardless of which side the department formally takes.

Indeed in the same testimony, Levi also hinted at doubts about the constitutionality of the 1974 law extending federal minimum wage requirements to fire and police employees of state and local governments; like the Clean Air Act, these minimum wage provisions are currently being defended in federal court by the Department of Justice.

Of course, the Attorney General may well have a point in believing that the Clean Air Act threatens vital constitutional principles. He may well have a point in questioning the campaign finance reform law. The troublesome question, however, is whether, since he is now Attorney General Levi and not Professor Levi, he has any business making those points in public.

Evidently, his initiative is unprecedented. Although Solicitor General Bork sought to find precedents for Post reporter John MacKenzie to justify the mutiny against the campaign act, he found none. While there are a number of quite honorable instances in which Attorneys General and especially Solicitors General have refused to defend exercises of *executive authority*, the Department of Justice appears never before to have asserted a general prerogative to sit in judgment over laws passed by Congress and signed by the President. Recently, for example, Solicitor General Erwin Griswold urged Supreme Court approval of the 1970 statute extending the vote to 18-year-olds, even though President Nixon had repeatedly opposed the law on constitutional grounds. And even where the Solicitor General has refused to sign a brief or argue a case, the department has appeared for the government through a lesser official.

While unprecedented, the Attorney General's view that personal scruples should be his primary compass cannot be dismissed as absurd. He is not, of course, simply a private lawyer. He takes authority in part from an oath to uphold the Constitution, a mandate for the exercise of independent legal judgment beyond that contemplated by a private attorney's retainer agreement. As Levi himself stated in a June 12 response to Curtis' appeals, "the Attorney General and the Solicitor General stand before the Supreme Court as its officers and not solely as advocates."

Levi took office after three decades in a university environment. There, individuals' ideas are the very currency of exchange and the measure of one's worth. It would be only natural for him to consider his convictions more sacred than any conflicting commitments. This perspective may seem especially appropriate to an Attorney General specially mandated to revive respect for principle in a department battered by Watergate.

And it must be emphasized that before the Commerce Committee, Levi was nothing if not gracious in venting his doubts on the federalism issue affecting the Clean Air Act. Acknowledging the contrary views of former Harvard Law Dean Griswold and former Yale Law Dean Louis Pollak, he said that, having once been a dean himself, he found deans "frequently wrong." He added, "that might include me, too, of course." He said, "I don't ask anyone to agree with me. History will, you know, keep the score."

However, to many observers Levi's personalistic definition of his role must appear unrealistic and inappropriate. Unrealistic, because it is a vain gesture for the Attorney General to belittle the impact of his statements by saying he asks no one to agree. Inappropriate, because a measure passed by Congress and signed by the President represents the ultimate product of the national democratic process. Even the Warren Court, not shy about invalidating state laws, rarely overturned a federal statute.

What warrant, therefore, does the Attorney General have in the American scheme, for questioning federal statutes, until and unless the Court has actually struck them down? His primary respect should be, not for some brooding omnipresence in the Chicago sky, but for his office, and its assigned role in the process of government. In court its role is to represent the United States. At a minimum, that means defending the decisions formalized as law by the people's representatives in Congress and the White House.

While there may be exceptions to this rule, the Clean Air Act and the campaign finance controls in the Campaign Act are not among them. Both are watershed reform laws, extensively reviewed by Congress. In changing the system which elected its own members, or in mediating between national policy and the sovereignty of its members' own states and localities, Congress resolved conflicting constitutional values more sensitively than could a single executive official, or a constitutional theorist.

If Levi's personalism endures as policy, the Department of Justice will, to that extent, no longer represent the United States, but the views of its chief and, probably, those of his chief in the White House. The President will ensure that his Attorney General's jurisprudential conscience closely resembles his own. Decisions by the department to oppose a law, in court or otherwise, could become a sort of back-door veto, seen perhaps as a variation on the theme of impoundment.

This Olympian posture could well, therefore, end the Justice Department's near monopoly role in government litigation and, in particular, the unique status held by the Solicitor General before the Supreme Court. Congress would need to establish its own litigating arm. It would probably authorize particular agencies to represent themselves, whenever representation from Justice could not be assured.

Ultimately, if Justice upholds laws on the selective—and subjective—basis indicated by Levi's recent initiatives, the result must be to weaken the department's professionalism and further politicize its operations. More disturbing are other implications one can foresee, if Justice thus spurns the tradition that it must follow the law as it is authoritatively prescribed. Under Attorneys General less intelligent and virtuous than the present one, further loosening of this commitment could compound, not cure, the Watergate malaise.