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Constitutional Law-Standing-U.S. Attorney General Has No Nonstatutory Standing to Sue Under the Fourteenth Amendment-United States v. Solomon

Constitutional Law—STANDING—U.S. ATTORNEY GENERAL HAS NO NONSTATUTORY STANDING TO SUE UNDER THE FOURTEENTH AMENDMENT—*United States v. Solomon,* 419 F. Supp. 358 (D. Md. 1976), *appeal docketed,* No. 76-2184 (4th Cir. Sept. 3, 1976).

The United States Attorney General brought suit for the United States (the government) against Maryland officials to enjoin certain practices and policies in the administration of the state's program of care and training for the institutionalized mentally retarded. The government claimed that these practices and policies resulted in widespread deprivation of rights guaranteed to the hospital's residents by the eighth, thirteenth, and fourteenth amendments.[1]

The Maryland officials moved to dismiss, contending that the Attorney General had no standing to initiate the suit. The United States claimed statutory authority to sue under 28 U.S.C. sections 516 and 518,[2] under the "take Care" clause of the Constitution,[3] and under a nonstatutory governmental right to sue arising when state actions result in widespread deprivation of constitutional rights.[4] The United States District Court for the District of Maryland held that without a specific statutory grant of authority the Attorney General's power did not rise to the bringing of a suit on behalf of the United States under the fourteenth amendment. Accordingly, the defendant's motion to dismiss was granted.

I. BACKGROUND

A. Statutory Authority

In 1870, Congress enacted a law creating the Department of Justice.[5] Section 5 of this act included the basic language cur-

1. The United States alleged cruel and unusual punishment in violation of the eighth amendment, involuntary servitude in violation of the thirteenth amendment, and deprivation of liberty without due process of law in violation of the fourteenth amendment. Memorandum of the United States in Opposition to Defendants' Motion to Dismiss at 32-33, United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976), *appeal docketed,* No. 76-2184 (4th Cir. Sept. 3, 1976).

2. 28 U.S.C. §§ 516, 518 (1970).

3. U.S. CONST. art. II, § 3: "[The President] shall take Care that the Laws be faithfully executed . . . ."

4. *See* notes 24-29 and accompanying text *infra.*

5. Department of Justice Act of 1870, ch. 150, 16 Stat. 162 (current version in scattered sections of 28 U.S.C.).

The office of Attorney General had previously been established by Congress. On September 24, 1789 a bill was passed by Congress in which provision was made for the

rently embodied in 28 U.S.C. sections 516 and 518(b). These sections provide that the Attorney General shall direct litigation in which the United States is "a party, or is interested," and that when the United States is "interested," the Attorney General may conduct any case in federal court when he "considers it in the interests of the United States."[6]

Clearly, sections 516 and 518(b) provide the Attorney General with both the authority and the responsibility to protect the interests of the United States in suits in which the United States is a defendant. While the Attorney General's access to the courts is not so apparent when he seeks to initiate suits as a plaintiff to protect alleged government interests, it seems clear, nonetheless, that when there is actually a legitimate interest of the United States that needs protection, sections 516 and 518(b) authorize the Attorney General to sue.[7]

The statutory language can be interpreted as a simple declaration that when the United States has a legitimate interest to protect (as defined by statute or traditional standing requirements) the Attorney General shall be the United States' representative in court. The language may also be interpreted as a more comprehensive declaration that the Attorney General is himself vested with the power to determine when the United

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appointment of an Attorney General "whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give advice" to the President and heads of departments of the national government. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73 (current version in scattered sections of 28 U.S.C.).

6. 28 U.S.C. § 516 (1970):

> [E]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 518(b) (1970):

> [W]hen the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or an officer of the Department of Justice to do so.

In the instant case, the Attorney General contended that in §§ 516 and 518(b) Congress has given the executive broad powers to sue to protect the interests of the United States. *See* Memorandum of the United States in Opposition to Defendants' Motion to Dismiss at 4-5, United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976), *appeal docketed,* No. 76-2184 (4th Cir. Sept. 3, 1976).

7. The Supreme Court has viewed the predecessors of §§ 516 and 518 as giving the Attorney General authority to protect government interests. Speaking of the statutes, the Court said: "[N]o Act of Congress has amended the statutes which impose on the Attorney General the authority and duty to protect the Government's interests through the courts." United States v. California, 332 U.S. 19, 27-28 (1947).

States has such an interest to protect.[8] The former interpretation gives the Attorney General authority to conduct litigation for the United States provided that the government has a demonstrable interest to protect that is sufficient to satisfy the requirements of standing.[9] The latter interpretation gives the Attorney General the authority to determine when the United States is "interested" and in effect allows the Attorney General to determine his own standing.

Specific statutory standing has been given the Attorney General in certain limited areas.[10] There is, however, no comprehensive description embodied in statute that identifies the requisite interest which allows the Attorney General to sue. Thus, it is necessary to examine case law to determine when and why the Attorney General has been given authority to sue in the absence of a statutory grant.

B. Nonstatutory Right to Sue

The first judicially created authority for the Attorney General to sue arose in cases involving his right to bring suit to protect the proprietary and contractual interests of the United States.[11]

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8. This expanded interpretation was rejected by one federal district court that said that § 516 "does not explicitly provide that officers of the Department of Justice may conduct any litigation in which they believe the government has any interest; it merely provides that if any is conducted, it shall be done by the Department of Justice." United States v. Daniel, Urbahn, Seelye, & Fuller, 357 F. Supp. 853, 858 (N.D. Ill. 1973).

A similar expanded interpretation, however, was applied in People *ex rel.* Woll v. Graber, 394 Ill. 362, 68 N.E.2d 750 (1946), in applying what is now 28 U.S.C. § 517 (1970). Section 517 states the following:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

The court in *Graber* stated:

> While the Attorney General may not maintain an action solely for the vindication of private rights or redress of private grievances in which the public has no interest and may not appear in any litigation upon behalf of a defendant except for the interests of the United States, we think it must be conceded that the above section authorizes the Attorney General to direct the appearance of a United States Attorney in any civil suit between private persons in which the interests of the United States are involved *and vests the Attorney General with discretionary power to determine when the interests of the United States are actually involved* in the litigation and require attention and protection.

394 Ill. at 370, 68 N.E.2d at 755 (emphasis added).

9. *See* notes 52-60 and accompanying text *infra.*

10. *See, e.g.,* note 49 *infra.*

11. *See* Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818). In explaining why

Later, government access to the courts was allowed when the Attorney General sought to set aside a land patent obtained from the government by fraud. "[T]hat the United States should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual," reasoned the Supreme Court, "is hardly open to argument."[12] In *United States v. American Bell Telephone,*[13] this rule was extended to give the government standing to protect itself against fraud in the obtaining of patents for inventions.

The language of the Court in *Bell Telephone* marked an expansion of the Attorney General's nonstatutory right to sue, since the Court emphasized the right of the government to sue to prevent a "grievous wrong upon the general public" rather than its right to protect the government's proprietary and contractual interests.[14] Thus, the Court began to show a willingness to allow the Attorney General standing to sue to protect not only the rights of the government as an entity but the rights of large groups of private citizens.

In re Debs[15] was the next major extension of the Attorney General's nonstatutory power to sue.[16] *Debs* involved a government suit to enjoin union activities that obstructed interstate commerce during the Pullman strike of 1894. Although the Court could have granted the Attorney General authorization to sue

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the United States could sue to protect its interests the court said: "In all cases of contract with the United States, they must have a right to enforce the performance of such contract, or to recover damages for their violation . . . . *It would be strange to deny to them a right which is secured to every citizen of the United States." Id.* at 181 (emphasis added). *See* United States v. Oregon, 295 U.S. 1 (1935); Kern River Co. v. United States, 257 U.S. 147 (1921); Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1851); United States v. Tingey, 30 U.S. (5 Pet.) 114 (1831).

12. United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888).

13. 128 U.S. 315 (1888).

14. *Id.* at 357-58:

> [I]t will be observed that this broad assertion [that the Attorney General has no standing] admits that a party may practice an intentional fraud upon the officers of the government . . . and that he may by means of that fraud perpetrate a grievous wrong upon the general public . . . . [T]he argument asserts that the practice of a gross fraud upon the United States, concerning matters of immense pecuniary value, and affecting a very large part of its population, is not a proper question of judicial cognizance. It would be a strange anomaly in a government . . . to hold that . . . there should be no remedy for such a wrong.

15. 158 U.S. 564 (1895).

16. *Debs* itself has served as precedent for further expansions of governmental standing. *See, e.g.,* United States v. Arlington County, 326 F.2d 929 (4th Cir. 1964). *But see* United States v. Biloxi Mun. School Dist., 219 F. Supp. 691 (S.D. Miss. 1963), *aff'd sub nom.* United States v. Madison County Bd. of Educ., 326 F.2d 237 (5th Cir.), *cert. denied,* 379 U.S. 929 (1964). *See generally* 84 HARV. L. REV. 1930, 1930-34 (1971).

because of the government's proprietary interest in the mails,[17] a much broader basis of standing was declared:

> We do not care to place our decision upon this ground alone [*i.e.*, proprietary interest in the mails] . . . . The obligations which [the government] is under to promote the interest of all, and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in the court. . . .
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> . . . [W]henever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.[18]

Relying on this broad language, courts have upheld the Attorney General when he has brought actions to protect alleged government interests. Thus, it has been generally recognized that the Attorney General has nonstatutory standing to maintain actions to relieve widespread burdens on interstate commerce,[19] to remove obstructions to navigable waters within the boundaries of the United States,[20] to protect the government's policies concerning national defense,[21] to enforce conditions of federal grants,[22]

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17. *See* Searight v. Stokes, 44 U.S. (3 How.) 151 (1845) (holding that the mails are property of the United States while in transit).

18. 158 U.S. at 584-86.

19. *See, e.g.*, United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970).

20. In Sanitary Dist. v. United States, 266 U.S. 405 (1925), the United States sued to enjoin an agency of Illinois from continuing practices that resulted in the lowering of the water level of Lake Michigan thereby obstructing commerce. The United States Supreme Court stated:

> The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce . . . but also to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned, and, it may be, also on the footing of an ultimate sovereign interest in the Lakes. The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize this suit.

Id. at 425-26.

21. In United States v. Arlington County, 326 F.2d 929, 923-33 (4th Cir. 1964), the court held that the government had a nonstatutory right to sue to protect members of the naval forces from being subjected to state personal property tax in violation of the Sailors' Civil Relief Act of 1940. *Accord,* Sullivan v. United States, 395 U.S. 169 (1969).

and to enjoin deprivation of civil rights if there is an accompanying burden on interstate commerce.[23] Although basing their holdings on other grounds, some courts have suggested that the Attorney General has "authority to sue to remedy widespread and severe deprivations of constitutional rights."[24]

The 1970 federal district court case of *United States v. Brand Jewelers, Inc.*[25] marked the broadest judicial interpretation to date of the Attorney General's nonstatutory right to sue. In *Brand* the Attorney General sued to enjoin a systematic practice of "sewer" service of process that resulted in numerous default judgments and subsequent garnishments of wages against ghetto dwellers.[26] The court held that the Attorney General had standing to sue due to the alleged burden on interstate commerce caused by the large-scale garnishment of wages.[27] The court also held

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22. United States v. Frazer, 317 F. Supp. 1079, 1084 (M.D. Ala. 1970):

> Aside from the contractual aspects of the relationship between the United States and the State of Alabama concerning these grants, there is no necessity for specific statutory authority in order to permit the United States to bring this action. . . . [I]t has been determined upon numerous occasions by the courts of our land that the Attorney General may sue on behalf of the United States by virtue of his office if the United States has an interest to protect. 28 U.S.C. §§ 516-519.

23. United States v. City of Shreveport, 210 F. Supp. 36 (W.D. La. 1962), *aff'd per curiam,* 316 F.2d 928 (5th Cir. 1963); United States v. Lassiter, 203 F. Supp. 20 (W.D. La.), *aff'd per curiam,* 371 U.S. 10 (1962).

24. Alexander v. Hall, 64 F.R.D. 152, 157 (D.S.C. 1974); *accord,* United States v. City of Jackson, 318 F.2d 1, 14-17 (5th Cir. 1963).

25. 318 F. Supp. 1293 (S.D.N.Y. 1970). For analyses of *Brand,* see Note, *Nonstatutory Executive Authority to Bring Suit,* 85 HARV. L. REV. 1566 (1972); 37 BROOKLYN L. REV. 426 (1971); 84 HARV. L. REV. 1930 (1971); 24 VAND. L. REV. 829 (1971); 17 WAYNE L. REV. 1287 (1971); 1971 WIS. L. REV. 665.

26. The defendants in *Brand* had developed a system whereby merchandise was sold to ghetto dwellers on easy terms. When the buyers failed to keep up the payments, process servers prepared affidavits evidencing service of process without ever having delivered the documents to the person to be served. Default judgments were entered and subsequently the ghetto dwellers' wages were garnished to pay the debt; the garnishment of wages was usually the first notice that these alleged debtors received. The Attorney General not only sought an injunction against the participating companies and process servers, but also sought damages for deprivation of property without due process of law. 318 F. Supp. at 1294.

27. Congressional findings show that commerce might be obstructed as a result of garnishment practices since they often result in loss of employment for the debtor that in turn results in disruption of employment, production, etc. Consumer Credit Protection Act of 1968, 15 U.S.C. § 1671(a)(2) (1970).

The trend has been to relax the requirement of a burden on interstate commerce. In *Debs,* decided in 1895, the burden on commerce was nationwide and the emergency nature of the situation required executive intervention through court action. In *Brand,* decided in 1970, the Attorney General was considered to have standing when the only link with interstate commerce was whatever burden on interstate commerce might arise from the

that the United States "has standing to sue to end widespread deprivations (*i.e.*, deprivations affecting many people) of property through 'state action' without due process of law."[28] This latter holding apparently constituted an extension that allowed the Attorney General to protect citizens' fourteenth amendment rights independent of interstate commerce considerations.[29]

The cases, then, demonstrate that the government's interest in interstate commerce has often given the Attorney General standing in the courts when mainly individual constitutional rights were being enforced.[30] Some of those cases could be interpreted as granting the Attorney General standing to vindicate constitutional rights independent of interstate commerce considerations. Alternative grounds of statutory authority or, following *Debs,* burdening interstate commerce existed, however, in every case.

II. INSTANT CASE

In *Solomon* the court began from the premise that the executive has no power unless it can be found in express congressional authorization or explicitly or implicitly in the Constitution. The court noted that sections 516 and 518

> tell us nothing about the nature of "interest" which will activate the Attorney General's discretion to act. These sections, therefore, constitute *no authority* on which to base a conclusion that Congress has explicitly authorized the executive to bring suits generally under the thirteenth and fourteenth amendments.[31]

Similarly, the court, noting that "the executive's burden of showing the need for an independent authority to act is most severe" in areas of protection of fourteenth amendment rights and development of interstate commerce policy, stated that the "take Care" clause was an insufficient rationale to justify allowing the Attorney General to maintain the action.[32]

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garnishment of wages. *See also* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942); United States v. Darby, 312 U.S. 100, 112-24 (1941).

28. 318 F. Supp. at 1299.

29. Traditionally, only natural persons have been allowed to sue to protect fourteenth amendment rights. Hague v. C.I.O., 307 U.S. 496, 514 (1939). Some courts have held that the United States is not a "person" within the meaning of the fourteenth amendment and is therefore unable to sue to protect fourteenth amendment rights. United States v. Biloxi Mun. School Dist., 219 F. Supp. 691, 693-94 (S.D. Miss. 1963), *aff'd on other grounds,* 326 F.2d 237 (5th Cir.), *cert. denied,* 379 U.S. 929 (1964).

30. *See* cases cited in notes 24-25 *supra.*

31. 419 F. Supp. at 362-63 (emphasis added).

32. *Id.* at 372. The Constitution directs that the President shall take an oath to

After tracing the development of nonstatutory standing of the Attorney General to its farthest reaches in the interstate commerce context[33] as represented by *Debs* and *Brand,* the court noted that "[t]he extension of the *Debs* principle toward the outer limits of the definition of 'burdens' on interstate commerce works a subtle reorganization of the balance of power between the executive and legislative branches of the federal government."[34] Furthermore, such an extension would upset the system of federalism in that it would expose nearly all state policies and programs to executive attack.[35] The court stated that the same principles of balance of powers and federalism "which militate against extending *Debs* to the limits of the notion of burdens on interstate commerce also dictate against . . . [extension of the *Debs* principle] into the area of thirteenth or fourteenth amendment enforcement."[36] The court also pointed out that Congress has specifically considered giving the Attorney General broad powers to sue under the fourteenth amendment and has rejected

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"preserve, protect, and defend the Constitution of the United States," U.S. CONST. art. II, § 1, cl. 7, and that he "shall take Care that the Laws be faithfully executed." *Id.* § 3. The Attorney General can be considered "the hand of the President in taking care that the laws of the United States in protection of the interests of the United States . . . be faithfully executed." Ponzi v. Fessenden, 258 U.S. 254, 262 (1922). Such reasoning could be used to argue that the Attorney General therefore has authority to bring suit to "take Care" that constitutional rights not be violated.

There is no question that Congress may give the Attorney General the power to enforce laws by criminal prosecution or civil suit. United States v. Solomon, 419 F. Supp. at 362. *See, e.g.,* United States v. Raines, 362 U.S. 17, 27 (1960). Absent statutory authority, however, it is not clear that the Attorney General may sue civilly to enforce the *constitutional* rights of others. In relation to private parties seeking standing, the courts have frequently stated that "one may not claim standing . . . to vindicate the constitutional rights of some third party." *See, e.g.,* Barrows v. Jackson, 346 U.S. 249, 255 (1953).

The courts have generally applied a narrow interpretation of the "take Care" clause. The court in the instant case declared that the clause is "subject to . . . circumspection." 419 F. Supp. at 372. Justice Frankfurter has expressed a similar view. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (concurring opinion) (quoting Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting)).

33. The executive's nonstatutory standing to sue under the commerce clause is well established. *See, e.g.,* Sanitary Dist. v. United States, 266 U.S. 405 (1925); Florida E. Coast Ry. v. United States, 348 F.2d 682, 685 (5th Cir. 1965), *aff'd sub nom.* Brotherhood of Ry. & S.S. Clerks v. Florida E. Coast Ry., 384 U.S. 238 (1966); United States v. City of Jackson, 318 F.2d 1 (5th Cir. 1963); United States v. City of Shreveport, 210 F. Supp. 36 (W.D. La. 1962); United States v. Lassiter, 203 F. Supp. 20 (W.D. La.), *aff'd per curiam,* 371 U.S. 10 (1962); United States v. City of Montgomery, 201 F. Supp. 590, 594 (M.D. Ala. 1962); United States v. United States Klans, Knights of the Ku Klux Klan, Inc., 194 F. Supp. 897, 902 (M.D. Ala. 1961).

34. 419 F. Supp. at 366.

35. *Id.*

36. *Id.* at 367.

all such proposals,[37] whereas Congress was silent as to the Attorney General's standing in the interstate commerce area.[38]

Thus, the court "respectfully decline[d]" to follow *Brand*'s "'imaginative unfolding' of the Debs principle into the area of fourteenth amendment enforcement"[39] and dismissed the Attorney General's suit.

III. ANALYSIS

The instant case is distinguishable from other cases concerning the Attorney General's standing because it did not contain recognized alternative grounds on which to base such standing. Here the Attorney General did not sue under any statute, nor did he sue to remove burdens from interstate commerce or to protect proprietary, contractual, or national defense interests. Rather, he claimed standing to sue directly and solely under the fourteenth amendment. Thus, an analysis of the issues in the instant case requires more than reliance on and citation of prior case law.

This analysis will first discuss the applicability of balance of powers[40] and federalism principles to the instant case and to the fourteenth amendment context and demonstrate how these principles should operate to deny nonstatutory standing to the Attorney General. Second, the analysis will show that traditional standing criteria could have been applied by the court to reach the same result.

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37. Title III of the proposed Civil Rights Act of 1957 would have empowered the Attorney General to initiate civil actions for injunctive relief to protect fourteenth amendment rights. This portion of the Act, however, failed to pass. 103 CONG. REC. 12, 530-65 (1957). A later attempt in 1964 also failed. H.R. REP. No. 914, 88th Cong., 1st Sess. 17, 22, 81-83, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2392, 2397-98, 2450-52. The legislative history reveals that Congress rejected these proposals because they would have placed too much power in the hands of the Attorney General and would have improperly interjected the Department of Justice into certain areas of litigation. H.R. REP. No. 914, 88th Cong., 1st Sess. 82, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2450.

38. The court further distinguished *Debs* by saying:

> It is one thing to give the executive an independent role when there is an emergency threat to interstate commerce to which only the executive branch of government has the capacity to respond with appropriate alacrity, but is quite another thing to give the executive an independent role where the "emergency" is debatable and all that may be at stake is the development of policy concerning interstate commerce. The commerce clause clearly anticipated that policy development is to be left to Congress.

419 F. Supp. at 366.

39. *Id.* at 368.

40. For a general treatment of the balance of powers concept, see A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE (1953).

A. Constitutional and Policy Considerations[41]

Liberal grants of standing to the Attorney General in the interstate commerce context have shifted some constitutional power in this area away from Congress. The court in the instant case refused to follow suit in the context of the fourteenth amendment. The court, analyzing the effects of the government's claimed right to sue on the balance of powers between the executive and the legislative branches, stated that the same considerations that dictate against extending the government's standing in the interstate commerce context also militate against granting standing to the Attorney General when suing under the fourteenth amendment.[42] In effect, the court acknowledged that nonstatutory standing has been improperly granted in marginal interstate commerce contexts, and refused to extend nonstatutory standing to the fourteenth amendment context. The court's analysis emphasizes the similarities in considerations governing the Attorney General's standing in interstate commerce cases and in fourteenth amendment cases. The court could have been much more persuasive, however, by illustrating the differences between these two classes of cases, thereby demonstrating that the Attorney General arguably should have standing in the interstate commerce context but not in the fourteenth amendment context.

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41. When dealing with policy considerations, a weighing process inevitably takes place in order for a decision to be made. Hence, to conclude that a certain action would adversely affect the balance of powers in the national government is not dispositive of the issue. Arguably, the government is flexible enough to tolerate some degree of imbalance in the power structure. The issue in the instant case is whether the sacrifice in the balance of powers is worth the good that might accrue by allowing the Attorney General to sue on the behalf of the mentally retarded.

42. *See* note 36 and accompanying text *supra*. It is not clear, however, that such is the case. The commerce clause is contained in the main body of the Constitution which distinguishes between the powers of the several branches of the national government. That portion of the Constitution was meant to establish and separate the powers of the three branches of the federal government. There is no doubt that the commerce clause was meant to give Congress, not the executive, the power to regulate commerce. Since Congress is given such plenary power concerning interstate commerce, any independent action on the part of the executive to regulate interstate commerce could be classified as an encroachment on the legislative power.

The fourteenth amendment, however, may not be subject to the same balance-of-powers analysis because it is an amendment and is not found within the constitutional articles that separate the powers of the governmental branches. Nevertheless, § 5 of the amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This may indicate that enforcement of fourteenth amendment rights is given to Congress rather than to the executive or judiciary. *But see* Memorandum of the United States in Opposition to Defendants' Motion to Dismiss at 18-22, United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976).

When commerce is significantly burdened, the economy of the United States arguably is injured. It follows, then, that the Attorney General represents the real party in interest, the United States, when he sues under the nonstatutory burden-on-commerce theory. In contrast, it can be persuasively argued that the fourteenth amendment was not meant to give the government a right that it could protect; rather, it was meant to endow citizens with power to enforce rights against the states. When constitutional rights are violated the real party in interest is the person who has suffered the injury. Moreover, there is no need for the Attorney General to sue to protect the rights of individuals who, under the fourteenth amendment, are given the opportunity to protect their own rights. Indeed, some courts have held that in the absence of congressional authorization, the Attorney General cannot enforce the constitutional rights of individuals.[43]

The issue of balance of powers between Congress and the Attorney General also exists because of the language of the fourteenth amendment. Section 5 of the amendment gives Congress "the power to enforce, by appropriate legislation, the provisions of this article." This language apparently means that Congress has the power to specify how fourteenth amendment rights are to be enforced.[44] In fact, Congress has so specified by enacting various civil rights provisions.[45] By "appropriate legislation," Congress has thus defined the circumstances under which the Attorney General may prosecute, intervene, or sue to protect constitutional rights. Since Congress has exercised the power to define in whose favor and under what circumstances an action will lie for violation of constitutional rights, it is an encroachment on that power to endow the executive branch with a nonstatutory power to sue under the fourteenth amendment.[46]

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43. *See, e.g.*, United States v. Biloxi Mun. School Dist., 219 F. Supp. 691, 693-94 (S.D. Miss. 1963), *aff'd sub nom.* United States v. Madison County Bd. of Educ., 326 F.2d 237 (5th Cir.), *cert. denied*, 379 U.S. 929 (1964); United States v. School Dist. of Ferndale, 400 F. Supp. 1122, 1129-30 (E.D. Mich. 1975). *See also* Tileston v. Ullman, 318 U.S. 44 (1943); Curtis v. Peerless Ins. Co., 299 F. Supp. 429, 434 (D. Minn. 1969); Krum v. Sheppard, 255 F. Supp. 994, 997 (W.D. Mich. 1966), *aff'd on other grounds*, 407 F.2d 49 (6th Cir. 1967).

44. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

45. *See* note 50 *infra*. In addition, individuals may sue directly under the fourteenth amendment.

46. The court implied that to allow the Attorney General to sue in the instant case would allow the executive branch to encroach on the power of Congress by exercising an independent role in making law and policy. *See* 419 F. Supp. at 366. This position relies on the assumption that the Attorney General by suing is directly or unilaterally making law or policy. No executive order is being issued; no law is being declared. The Attorney

Another important constitutional question arising from the instant case—and one not discussed by the court—concerns federalism policies.[47] The question is whether the fourteenth amendment should be enforced against the states by the Attorney General, or whether it should be enforced by providing individuals with a cause of action against states that violate their rights. Since state action depriving individuals of constitutional rights is intolerable under the Constitution, unilateral executive action would arguably be justifiable to enjoin such state action.[48] If, however, the executive were granted standing under the fourteenth amendment, the litigation would inevitably be directed at state officials, thereby increasing the tension between national and state governments and dealing a serious blow to federalism.

General is merely suing in the courts to enforce a law proposed by Congress and ratified by the states.

Any law or policy that might be developed by allowing the Attorney General to sue would be made jointly by the executive and judicial branches. This is not meant to suggest that a majority rules among the branches of the federal government. One branch should not be able to augment its powers or upset the balance of powers by simply gaining the approval of another branch; our system of government recognizes that each branch can operate as a check on any other branch. Nevertheless, it is possible that the executive and judicial branches combined can do what the executive alone cannot. Such was the case when the executive was granted standing to sue to remedy burdens on interstate commerce. Of course Congress could legislate to negate such executive and judiciary action, and thus operate as a check on the combined efforts of those branches. The fact that such legislation has not been enacted supports at least a possible inference that Congress approved of giving the executive such standing. As the court in *Solomon* properly notes, this inference is not particularly strong:

> Action by Congress is usually time-consuming and quite arduous. To place a burden of response on the legislative process would undoubtedly result in the development of ambiguous policy situations in which, for whatever reasons, the legislature has been unable to grind out either an explicit approval or disapproval of the policy brought into being by an executive lawsuit.

Id. To grant standing to the executive to sue in the fourteenth amendment context and let Congress decide whether to legislate otherwise may not be a satisfactory approach. *See* Note, *Nonstatutory Executive Authority to Bring Suit,* 85 HARV. L. REV. 1566, 1574-75 (1972).

47. The resolution of the balance of powers question bears heavily on the consideration of federalism. Indeed, it seems impossible in the present context to completely separate the two. If it were decided, for instance, that the executive has nonstatutory power under the fourteenth amendment to sue the states for alleged violations of citizens' rights, a direct confrontation of federal and state power comes into play. If, on the other hand, the executive were allowed to sue the states for violation of fourteenth amendment rights pursuant only to congressional authorization, a softening influence is imposed between executive power and states' rights.

48. Executive court action helped to remedy the widespread discrimination prevalent in the South during the early 1960's. Such action in the courts might also expedite the process of securing to the mentally retarded their rights. Discussion of the extent of the rights of the mentally retarded and the application of constitutional rights to the institutionalized, however, is beyond the scope of this case note.

Allowing individuals to enforce their own rights against the states through the Constitution, on the other hand, does little if any harm to federalism policies.

Neither federal nor individual action is the exclusive method of enforcing the fourteenth amendment. Congress has established a blend of federal and individual enforcement of fourteenth amendment rights.[49] That blend has been altered from time to time to meet current problems in our society.[50]

The challenge of striking an acceptable balance between federal and state powers while at the same time adjusting the balance between federal and individual enforcement of constitutional rights to meet current needs is a task that can best be performed by the national legislature. Of the three branches of the federal government, Congress, through its representatives

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49. In establishing the scheme of enforcement of constitutional rights, Congress has given broad powers to individuals whose rights have been violated to bring suit to enforce those rights. *See* 42 U.S.C. §§ 1983, 1985 (1970). On the other hand, Congress has been careful to limit the power of the Attorney General to enforce such rights. The Attorney General may bring civil suit only in the areas of voting rights, 42 U.S.C. § 1971(c) (1970); public accomodation, 42 U.S.C. §§ 2000a-3, 2000a-5 (1970); public facilities, 42 U.S.C. § 2000b (1970); school desegregation, 42 U.S.C. § 2000c-6 (1970); and housing, 42 U.S.C. § 3613 (1970). Even in these areas the Attorney General's powers are limited. For example, in actions under § 2000c the Attorney General must receive a meritorious complaint from the victim of discrimination and certify that the person is unable to "initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education . . . ." 42 U.S.C. § 2000c-6(a) (1970).

Under 18 U.S.C. §§ 241-242 (1970), the Attorney General may prosecute for conspiracy against the rights of citizens or deprivation of rights under color of law. Section 242 states: "[w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . ." If the Attorney General can prosecute when a party deprives another of constitutional rights under color of law, it seems logical that he should be able to sue civilly to enjoin a party from such actions. An analogous line of reasoning was applied in *In re* Debs, 158 U.S. 564 (1895). There the Court reasoned that if the executive could have called out the military to remedy the burden on interstate commerce caused by the Pullman Strike of 1894, it would be anomalous to block the executive's effort to solve peacefully the problem by suing for an injunction in the courts. It appears, however, that to apply this reasoning in the fourteenth amendment context would establish a different standard of proof than was intended by §§ 241 and 242. Because §§ 241 and 242 are criminal statutes, convictions would have to be based on proof beyond a reasonable doubt. If the executive were allowed standing to sue civilly, the standard applied to civil suits (proof by a preponderance of the evidence) would allow the Attorney General to accomplish enforcement of constitutional rights in situations where it formerly was not possible.

50. For example, the Attorney General was given temporary powers to sue under 42 U.S.C. § 2000e-6 (Supp. V 1975) to expedite the securing of employment rights to minorities.

from every state, can be most sensitive to the effect that expansion of government powers in the area of fourteenth amendment enforcement would have on the federal system. It seems fitting, therefore, that Congress should continue to strike that balance between individual and federal enforcement through statutory enactments. For the courts to allow the Attorney General to enforce constitutional rights against the states without statutory authorization, especially in the face of congressional disapproval,[51] would not only smack of judicial legislation but would impair Congress' ability to balance federalism considerations.

B. Standing

Although the issue presented to the court by the defendants' motion to dismiss was primarily a question of standing, the court in reaching its decision placed little emphasis on elements of standing. The main thrust of the opinion concerns federalism and balance of powers arguments. Although, as will be shown below, the court reached a sound result as to the standing issue, it would have been more persuasive had the court utilized the established criteria of standing[52] in reaching its decision.

The question of standing involves both constitutional and prudential limitations[53] on the exercise of federal jurisdiction. The constitutional limitation consists of meeting the "threshold question" in every case by determining if the plaintiff has made out a case or controversy within the meaning of Article III.[54] In its constitutional sense, standing is a question of whether the

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51. *See* note 37 and accompanying text *supra*.

52. Admittedly, the law of standing is in a state of confusion. *See* Warth v. Seldin, 422 U.S. 490 (1975) (compare Justice Brennan's dissent with Justice Powell's majority opinion); Note, *Standing To Assert Constitutional* Jus Tertii, 88 HARV. L. REV. 423 (1974); *see generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1547-81 (9th ed. 1975). The confusion is further complicated by recent decisions concerning the criteria applied to determine standing. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 46 (1976) (Brennan, J., concurring); Warth v. Seldin, 422 U.S. 490 (1975); 42 BROOKLYN L. REV. 390, 407 (1975). In addition, it is not clear that the standing tests enumerated in the leading cases apply to all types of plaintiffs. For example, in *Warth* the Court held that "a *plaintiff who seeks to challenge exclusionary zoning practices* must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention." 422 U.S. 490, 508 (1975) (emphasis added). This test may not apply to all plaintiffs. Nevertheless, an examination of the case law reveals that certain tests of standing recur.

53. In addition to constitutional limitations, the courts have imposed limitations on federal jurisdiction as a matter of judicial self-governance. These latter are called prudential limitations.

54. Warth v. Seldin, 422 U.S. 490, 498 (1975).

plaintiff has alleged a personal stake in the controversy sufficient to assure the "concrete adverseness" upon which courts depend for "illumination of difficult constitutional questions."[55] Furthermore, plaintiffs in federal courts must allege some "threatened or actual injury" before a court may obtain jurisdiction.[56] Congress, of course, cannot abrogate the constitutional standing requirements derived from Article III.

Unlike the constitutional limitations, the judicially imposed prudential limitations can be abrogated by statute.[57] Significant prudential requirements of standing include the need for the actual injury to be a particularized injury rather than a "generalized grievance."[58] Also, prudential limitations require that the plaintiffs assert their own legal rights and interests, and not rest their claims to relief on the rights or interests of third parties.[59] Another prudential requirement of standing is that the statutory or constitutional provision upon which plaintiffs' claims are based must be understood to grant persons in plaintiffs' positions a right to relief.[60]

In the instant case, Congress had not expressly given the Attorney General standing; therefore, both constitutional and prudential standing rules were applicable. By claiming particularized injury of the type warranting judicial relief, the government in the instant case might have asserted that three separate interests were substantial enough to give the Attorney General standing. These interests are briefly evaluated below.

1. Federal legislation

The existence of federal appropriations and legislation to benefit the mentally retarded arguably demonstrates that the government has a sufficient interest in enforcing the rights of the mentally retarded to give the Attorney General standing to bring suit. Standing, however, is not achieved by an intense concern,

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55. Baker v. Carr, 369 U.S. 186, 204 (1962).

56. Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). *Accord,* Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972); Jenkins v. McKeithen, 395 U.S. 411, 423-24 (1969); Flast v. Cohen, 392 U.S. 83, 99-100 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

57. Warth v. Seldin, 422 U.S. 490, 500-01 (1975).

58. *Id.* at 499; *see, e.g.,* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226-27 (1974); United States v. Richardson, 418 U.S. 166, 176-80 (1974); *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam).

59. Warth v. Seldin, 422 U.S. 490, 499 (1975). *See* Barrows v. Jackson, 346 U.S. 249, 255-56 (1953); Tileston v. Ullman, 318 U.S. 44, 46 (1943). *See also* United States v. Raines, 362 U.S. 17, 20-22 (1960).

60. Warth v. Seldin, 422 U.S. 490, 500 (1975).

but only by a personal stake in the outcome of litigation such as will guarantee sufficient adversity to create a "case or controversy" between the parties.[61]

By acting for the benefit of the mentally retarded, Congress has indeed shown a concern for the problems of a disadvantaged minority. It is difficult, however, to imagine that this interest is a personal stake in the outcome sufficient to assure "concrete adverseness." Any harm to the United States that might arise from such a general interest could scarcely be termed a "particularized injury." Moreover, one would be hard put to discover any aspect of life that has not received the attention of legislation and that would be immune from government suit should interest measured merely by congressional "concern" be deemed to satisfy standing requirements.[62]

2. *Integrity of funding programs*

Since the Maryland state hospital involved in the instant case has received a substantial amount of funds from government coffers,[63] the federal government arguably has standing to ensure

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61. Note 54 *supra.*

62. In the instant case, even if the United States could show some "threatened or actual injury" to itself, the Attorney General could not sue to protect the constitutional rights of the institutionalized because of the doctrine of *jus tertii.* "One may not claim standing . . . to vindicate the constitutional rights of some third party." Barrows v. Jackson, 346 U.S. 249, 255 (1953).

One legal writer has noted the following:

> In those cases permitting the assertion of constitutional jus tertii, the Court has noted the presence of a variety of factors that allegedly justified a departure from its articulated rule. Three considerations . . . seem to recur: first, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders' asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted.

Note, *Standing To Assert Constitutional* Jus Tertii, 88 HARV. L. REV. 423, 425 (1975). The present case does not qualify under any of the three above-stated exceptions.

63. On appeal one of the litigants noted:

> Submissions to the district court reflect that Rosewood has received over 13 million dollars over the last three years . . . through the Medicaid program. Statutes provide that funds such as this may be expended if the primary purpose of the institution in question is "to provide health or rehabilitative services," it meets standards "prescribed by the Secretary [of Health, Education and Welfare]" and the individuals for whom payment is sought are "receiving active treatment." 42 U.S.C. § 1396d(d).

Brief for The United States at 26, United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976), *appeal docketed,* No. 76-2184 (4th Cir. Sept. 3, 1976).

The Secretary of Health, Education and Welfare has established standards for "intermediate care facilities." 45 C.F.R. § 249.12 (1976). The effect of these regulations

that no constitutional rights are violated in the administration of the funded programs. In some cases the Attorney General has been deemed to have standing to enforce the conditions of federal grants.[64] In such cases, however, the government was not suing under the fourteenth amendment but rather under contract theory or statute. Undeniably the government could cut off funds or sue under a contract theory if conditions of federal grants were violated.[65] The Attorney General did not proceed under such a theory in the instant case, but instead sued under the fourteenth amendment.[66] To allow the Attorney General broad powers of enforcement under the fourteenth amendment because of the government's interest in its funding programs would effectively destroy all limitations on government suits; it is difficult to find state programs that have not had the benefit of some federal dollars.

Furthermore, the government often seeks to further its policies by attaching conditions to federal grants. Such funding programs can readily be protected by cutting off funds to organizations that refuse or fail to comply with the conditions of the grants. Giving the government a broad power to sue under the fourteenth amendment because it attached conditions to the receipt of federal funds, however, would in effect allow the federal government to purchase an otherwise unavailable right to sue.

In sum, the government's interest in its funding programs might provide a "stake in the outcome" sufficient to satisfy constitutional standing to sue under some legal theories. But such an interest, in the absence of statutory authorization, does not give the United States standing to vindicate the constitutional rights of individuals under the fourteenth amendment.[67]

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and of 42 U.S.C. § 1396d(d) (Supp. V 1975) cited above is not an appropriate subject for decision in the instant case. It may be that the Attorney General could establish standing to sue under these regulations to enforce conditions attached to Medicaid funds received by the hospital. The Attorney General in the instant case, however, sued under the fourteenth amendment; therefore, whether he would have standing to sue under the regulations and statutes is not relevant to this case.

64. United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970). *See* United States v. Shanks, 384 F.2d 721, 723 (10th Cir. 1967); Griffin v. United States, 168 F.2d 457, 459 (8th Cir. 1948); United States v. Fitzgerald, 201 F. 295, 296 (8th Cir. 1912); *see also* McGee v. Mathis, 71 U.S. (4 Wall.) 143, 155 (1866); United States v. Harrison County, 399 F.2d 485, 491 (5th Cir. 1968), *cert. denied*, 397 U.S. 918 (1970).

65. *See* Lau v. Nichols, 414 U.S. 563 (1974).

66. 419 F. Supp. at 361.

67. *See* note 43 and accompanying text *supra*.

3. Parens patriae

In *Solomon* the government claimed an interest in remedying widespread deprivations of constitutional rights.[68] Under this theory the government would be acting as a sort of parens patriae. Such a theory, although available to state governments in certain situations,[69] has not frequently been applied to the federal government.[70]

Even if the federal government could make general use of the parens patriae doctrine in the instant case, the government would not meet the three requirements of the doctrine. First, the parens patriae must assert a minimal proprietary interest of its own.[71] The Attorney General in the instant case might be able to satisfy this requirement by asserting the interest of the United States in federal funds allegedly misused by the defendants. Second, the threatened injury must affect a "considerable portion" of the country's citizens.[72] Here, the federal government would not be able to satisfy the requirement. The 1600 persons confined at the Maryland institution clearly are not a "considerable portion" of the nation's citizenry. And third, suit by the parens patriae cannot be for the benefit of particular individuals.[73] The Attorney General's action for particular institutionalized individuals in the instant case prevents the fulfillment of this requirement as well. Thus, it is apparent that the Attorney General has no grounds to sue under parens patriae theory in addition to being unable to satisfy other standing criteria.

IV. CONCLUSION

Although some courts would happily have entangled themselves in the emotional issues concerning the rights of the men-

68. 419 F. Supp. at 361.

69. *See* note 68 *supra* and notes 70-73 and accompanying text *infra*. *See also* Georgia v. Pennsylvania R.R., 324 U.S. 439, 450 (1945); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 180 U.S. 208 (1901).

70. At times it may seem that the federal government acts as parens patriae in protecting the rights of individuals, *e.g.*, when the government sues under 42 U.S.C. § 2000c (1970) to enforce school desegregation. Such a suit, however, is specifically authorized by statute and does not rely on a parens patriae theory to satisfy standing requirements.

71. Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); 17 WAYNE L. REV. 1287, 1299 (1971).

72. Kansas v. Colorado, 185 U.S. 125, 142 (1902); 17 WAYNE L. REV. 1287, 1299 (1971).

73. Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 393-94 (1938); 17 WAYNE L. REV. 1287, 1299 (1971).

tally retarded, the court in the instant case carefully refused to view this case as deciding anything about the rights of the institutionalized.[74] Although the decision may affect the rights of the institutionalized,[75] the court's approach reaches a result that would not create a dangerous precedent for allowing the Attorney General nonstatutory authority to sue under the fourteenth amendment.

Granting the Attorney General standing in the instant case would leave very few limitations on the Attorney General's power to sue. In response to a query by Congress as to the result of giving the Attorney General power to sue under the fourteenth amendment, Attorney General Robert F. Kennedy said that such a provision would enable the Department of Justice to initiate or intervene in suits concerning

> [s]tate criminal proceedings or in book or movie censorship; disputes involving church-state relations; economic questions such as allegedly confiscatory ratemaking or the constitutional requirement of just compensation in land acquisition cases; the propriety of incarceration in a mental hospital; searches and seizures; and controversies involving freedom of worship, or speech, or of the press.[76]

In effect, to allow the Attorney General a general power to sue under the fourteenth amendment would allow him to step into the shoes of any private citizen and become the self-appointed protector of all private rights in order that remote government interests be protected. By dismissing the Attorney General's claim in the instant case the court avoided establishing a precedent that could have been misused to allow executive interference in disputes involving private rights. Although allowing the Attorney General to sue when state actions deprive the developmentally disabled of their constitutional rights would be one means of protecting those rights, such power should be given, if at all, by Congress to insure that the rule and its limitations can be carefully prescribed. The significance of the instant case is the attempt by the court to limit a power dangerous not necessarily in its present use, but in its potentialities.[77]

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74. 419 F. Supp. at 361.

75. The decision at least effects a delay as to when the institutionalized may enjoy their rights, if in fact they are deprived, *i.e.*, until Congress can act (assuming it chooses to grant statutory authority to the Attorney General to sue).

76. H.R. REP. No. 914, 88th Cong., 1st Sess. 82, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2450.

77. Note, *Growing Executive Power and the Constitution*, 4 SYRACUSE L. REV. 109, 117 (1952).