

Lecture

EXECUTIVE DEFENSE OF CONGRESSIONAL ACTS

DANIEL J. MELTZER[†]

ABSTRACT

This Article explores the appropriate role of the executive branch in enforcing and defending federal statutes that the president, or executive-branch officials, believe may well be unconstitutional, but for whose constitutional validity reasonable arguments can be advanced. The Article first locates the question of the scope of the executive branch's responsibility to enforce and defend federal statutes in the larger debate about the extent to which political branches of government are authorized—or even obligated—to make determinations of constitutionality independently of the views of the judiciary. It then reviews the historical practice of the executive branch in defending federal statutes—both the very strong presumption that statutes will be enforced and in turn defended if challenged in court and the departures from that general practice. The Article then considers a range of institutional practices and norms that are significant in considering the question. A number of considerations—including the distinctive capacities of the executive

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Unless otherwise indicated, this Article speaks as of the date of the Lecture. I have noted some subsequent developments but have not tried to account for all that has since transpired.

I worked on matters related to the subject of this Lecture while serving as principal deputy counsel to the president from January 2009 through May 2010. The views expressed here are my own and do not represent the position of the United States or any component thereof.

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branch, the relationship between career lawyers and political appointees in the executive branch, the virtues of institutional continuity within the executive branch, and the relationship between the executive branch and Congress—reinforce the wisdom of the conventional practice of defending even those statutes that an incumbent administration views as offensive and possibly invalid. Moreover, a regime in which each administration views itself as having significant latitude to refuse to enforce and defend acts of Congress would be considerably less attractive than particular decisions or theories, given that different administrations are likely to have sharply different views about the appropriate occasions for, and the appropriate theories underlying, a refusal to enforce or defend federal statutes. In a world featuring an extremely broad range of views about proper constitutional interpretation, partisan correlates to those views, a powerful temptation to equate what is misguided or immoral with what is unconstitutional, increased polarization of the political parties, and a lack of commitment to the idea of judicial restraint, decisions not to defend or enforce have the capacity to contribute significantly to the unraveling of the executive branch’s practice of defending federal statutes. This Article also examines the responsibility of the judiciary to provide the executive branch with the operating room that it needs to be able to defend, candidly and with integrity, statutes with whose premises the president and his administration strongly disagree. In the end, the question of the executive branch’s responsibility to enforce and defend statutes is not governed by a legal rule derivable from the Constitution itself, but is a matter of judgment, informed by a welter of historical and institutional concerns.

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INTRODUCTION

Chief Justice Taft is said to have once described a constitutional lawyer as “one who had abandoned the practice of the law and had gone into politics.”¹ Taft would thus view it as redundant to say that my topic concerns constitutional politics. Indeed, it concerns what one might call applied constitutional politics or, more broadly, norms of constitutional culture. I will discuss the scope of the executive branch’s responsibility to enforce and defend statutes that it views as misguided, offensive, and very possibly unconstitutional.

My focus is on the Don’t Ask, Don’t Tell policy that bans openly gay or lesbian individuals from serving in the military² and the section of the Defense of Marriage Act³—commonly called DOMA—that denies same-sex spouses, lawfully married under state law, a broad set of federal benefits.⁴ These are provisions that President Obama urged be repealed⁵ and that several, though by no means all, lower courts have ruled unconstitutional.⁶

1. 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 625 (1951) (quoting Charles Evans Hughes).

2. See National Defense Authorization Act for Fiscal Year 1994 § 571, 10 U.S.C. § 654(b) (2006) (listing the conditions under which a service member must be discharged for homosexuality). The precise statutory proscription is somewhat more complex than the statement in text.

3. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

4. Defense of Marriage Act § 3, 1 U.S.C. § 7 (2006). Section 2 of that Act, which provides that no state must give effect to any act, record, or judicial proceeding of another state respecting a same-sex marriage, raises distinct issues. *Id.* § 2, 28 U.S.C. § 1738C.

5. See, e.g., President Barack H. Obama, Address Before a Joint Session of the Congress on the State of the Union, DAILY COMP. PRES. DOC. No. DCPD201000055, at 11 (Jan. 27, 2010) (“This year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are.”); President Barack

After I began working on this Lecture, Congress enacted legislation under which a repeal of Don't Ask, Don't Tell was likely to take effect in 2011.⁷ (The repeal of the policy ultimately took effect on September 20, 2011.⁸) And then, six weeks ago, the attorney general announced that the Obama administration would no longer defend DOMA.⁹ It seems that, despite my best efforts, I have stumbled into topicality.

My discussion proceeds as follows. In Part I, I locate the question of the scope of the executive branch's responsibility to enforce and defend federal statutes in the larger debate about the extent to which the political branches of government are authorized—or even obligated—to make determinations of constitutionality independently of the views of the judiciary. In Part II, I discuss more specifically the historical practice of the executive branch in defending federal statutes—both the very strong presumption that statutes will be enforced and in turn defended if challenged in court and the departures from that general practice. In Part III, I turn to evaluating whether the government should enforce and defend statutes in light of a variety of institutional realities in the operation of the government. I contend that a range of considerations, including the distinctive capacities of the executive branch, the nature of relations between career lawyers and political appointees in the government, the virtues of institutional continuity within the executive branch, and

Obama, Remarks on Signing a Memorandum on Federal Benefits and Non-Discrimination, 1 PUB. PAPERS 847, 848 (June 17, 2009) (“Among the steps we have not yet taken is to repeal the Defense of Marriage Act. I believe it’s discriminatory, I think it interferes with States’ rights, and we will work with Congress to overturn it.”); Jen Colletta, *Obama Unveils LGBT Priorities List*, PHILA. GAY NEWS (Dec. 4, 2008), http://www.epgn.com/view/full_story/736919/article-Obama-unveils-LGBT-priorities-list (reporting President-elect Obama’s plans to urge the repeal of both Don't Ask, Don't Tell and DOMA).

6. See *infra* note 140.

7. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. Under that Act, the effective date of repeal is sixty days after the president has transmitted to the congressional defense committees a certification, signed by the president, the secretary of defense, and the chairman of the joint chiefs of staff, stating that implementation by the Defense Department of the policies and regulations necessary to effect a repeal is consistent with military readiness, military effectiveness, unit cohesion, and recruiting and retention of the armed forces. *Id.* § 2(b), 124 Stat. at 3516.

8. President Barack Obama, Statement on the Repeal of the Department of Defense's “Don't Ask, Don't Tell” Policy, DAILY COMP. PRES. DOC. No. DCPD201100653 (July 22, 2011).

9. See Letter from Eric H. Holder, Jr., Attorney Gen. of the U.S., to Representative John A. Boehner, Speaker, U.S. House of Representatives 5 (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

the relationship between the executive branch and Congress, reinforce the wisdom of the conventional practice of providing a defense even of statutes that the incumbent administration views as offensive and possibly invalid. In Part IV, I consider the matter from a higher level of generality, asking what would happen under a *regime* in which each administration views itself as having significant latitude to refuse to enforce and defend acts of Congress. Such a regime, I contend, is likely to be less attractive than any particular decisions, for a very simple but important reason: different administrations are likely to have sharply different views about the appropriate occasions for, and the appropriate theories underlying, a refusal to enforce or defend federal statutes. In a world featuring an extremely broad range of views about proper constitutional interpretation, partisan correlates to those views, a powerful temptation to equate what is misguided or immoral with what is unconstitutional, increased polarization of the political parties, and little commitment to the idea of judicial restraint, decisions not to defend or enforce have the capacity to contribute significantly to the unraveling of the executive branch's practice of defending federal statutes. Finally, in Part V, I examine the responsibility of the judiciary to provide the executive branch with the operating room that it needs to be able to defend, candidly and with integrity, statutes with whose premises the president and his administration strongly disagree.

I. DEPARTMENTALISM AND JUDICIAL SUPREMACY

The question of the executive's proper role in enforcing and defending statutes implicates the broader debate about the proper role of the executive branch in making constitutional determinations and the relationship of the executive's constitutional interpretations to those of the courts. That larger debate has focused primarily on whether the executive may take action that the courts have deemed to be unconstitutional. For example, Chief Justice Taney ruled that President Lincoln lacked the power unilaterally to suspend the writ of habeas corpus;¹⁰ just over a century later, the Supreme Court ordered President Nixon to comply with a grand jury subpoena issued in connection with the Watergate investigation.¹¹ Suppose President Lincoln and President Nixon both believed the courts got the

10. *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861).

11. *United States v. Nixon*, 418 U.S. 683, 714 (1974).

Constitution wrong. Must they nonetheless honor the courts' decisions? If so, is any obligation limited to complying with specific orders, as Lincoln famously suggested,¹² or must the executive more broadly follow the doctrines laid down by the courts?

This debate pits two competing views against each other. The first view, often called judicial supremacy, asserts that the executive must treat the courts' constitutional interpretations as authoritative.¹³ Although no canonical definition of judicial supremacy exists, I use the phrase as calling for the political branches to conform their conduct to the rules, including the reasoning, of judicial decisions, particularly those of the Supreme Court—even if those decisions, in turn, sometimes exhibit deference to the positions of the political branches.¹⁴ Judicial supremacy is premised on some combination of the need for a single, authoritative settlement function,¹⁵ a belief that only the judiciary serves as a forum of constitutional principle,¹⁶ the related view that only the courts can serve the countermajoritarian role of protecting individual rights and political minorities,¹⁷ and an even more generalized sense that courts are particularly good at constitutional interpretation.¹⁸ The idea of judicial supremacy does not preclude other branches from making constitutional determinations; rather, it holds that the other branches should rest their determinations on the constitutional views set forth in judicial decisions.

12. See President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in S. DOC. NO. 101-10, at 133, 139 (1989); see also Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987).

13. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 1–13 (2007). See generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (arguing that the settlement of contested constitutional issues can be achieved only if the judiciary holds the ultimate interpretive role).

14. Cf. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 780 (2002) (suggesting that judicial supremacy also entails little judicial deference to the constitutional judgments of the political branches when reviewing executive or congressional action).

15. See Alexander & Schauer, *supra* note 13, at 1377.

16. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33 (1985).

17. See, e.g., Whittington, *supra* note 14, at 827–28 (describing, without endorsing, this view).

18. See WHITTINGTON, *supra* note 13, at 1–13. See generally Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004) (proposing a cooperative form of interbranch constitutional interpretation in which each branch recognizes the strengths of the others).

The rival view, known as departmentalism, asserts that the executive has a coordinate, indeed equal, role in interpreting the Constitution. Supporters of departmentalism often root their position in historical materials¹⁹ or in a conception of the three branches as having equal responsibility for interpretation of the Constitution.²⁰ In addition, some supporters of departmentalism have argued that the political branches have a distinctive capacity to provide constitutional interpretations that, as compared to those of the judicial branch, are less technical and formulaic and are better grounded in currents of political justice, popular will, and constitutional culture.²¹

The question whether to enforce or defend Don't Ask, Don't Tell and DOMA differs sharply from the situations most frequently discussed in this classic debate. The executive, if it refused to defend or enforce these statutes, would not be violating anyone's constitutional rights; the Constitution does not prohibit gay and lesbian individuals from serving in the military or married same-sex couples from receiving federal benefits. Instead, the executive would simply be taking a view of the Constitution not authoritatively recognized by the courts,²² as past presidents have sometimes done. President Jefferson ended pending prosecutions under the Sedition Act²³ and pardoned individuals previously convicted under that Act,²⁴ even though the courts had upheld the Act's constitutionality.²⁵ Writing to Abigail Adams in 1804, Jefferson said that although judges who believed the Sedition Act to be constitutional had a right to

19. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 228–62 (1994).

20. See, e.g., EDWARD S. CORWIN, COURT OVER CONSTITUTION 5–6 (1938); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 918, 924–25 (1990).

21. See, e.g., Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 355 (1994); Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENT. 63, 72 & n.37 (1999); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1946 (2003); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 418 (1993); see also *infra* text accompanying notes 131–47.

22. See, e.g., Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1224–25 (2006).

23. Sedition Act, ch. 74, 1 Stat. 596 (1798). Although it expired on the date of the inauguration of the next president (March 3, 1801), the Sedition Act provided that the expiration would “not prevent or defeat a prosecution and punishment of any offense against the law, during the time it [was] in force.” *Id.* § 4, 1 Stat. at 597.

24. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 73 (2004).

25. *Id.* at 68.

impose sentences, “nothing in the Constitution ha[d] given them a right to decide for the Executive.”²⁶ Some years later, President Jackson took a similar view of the executive’s responsibility when he vetoed the bill to recharter the Bank of the United States, resting on a constitutional objection—Congress’s lack of legislative authority—that the Supreme Court had rejected in *McCulloch v. Maryland*.²⁷

But these examples still differ from the issues presented by Don’t Ask, Don’t Tell and DOMA. First, neither President Jefferson nor President Jackson refused to defend a statute in pending litigation. Indeed, President Jackson’s veto prevented the bank bill from becoming law.²⁸ As for President Jefferson, it can hardly be said that his pardons disregarded a duty to enforce or defend a congressional statute, given that the pardon power, by its nature, involves undoing the prior enforcement, via conviction, of a statute. And although the abatement of pending prosecutions failed in one sense to enforce the Sedition Act, given the breadth of prosecutorial discretion—whether rooted in the Constitution, in the presumed intention of Congress, or in some combination of the two²⁹—it is hard to view Jefferson as having disregarded a congressional mandate. There is no parallel tradition under which the decision whether to follow the prescriptions of Don’t Ask, Don’t Tell and DOMA has been broadly committed to executive discretion.³⁰

26. Letter from President Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 310 n.1, 311 n.1 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1897).

27. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *see also* President Andrew Jackson, Veto Message (July 10, 1832), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144 (James D. Richardson ed., n.p., Bureau of Nat’l Literature 1897) (“It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent.”).

28. Although presidential vetoes have come to be most often based on policy disagreements, in the early Republic they most frequently rested on constitutional concerns. *See* WHITTINGTON, *supra* note 13, at 170–87.

29. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 532 (1996).

30. Exceptions to the generalization stated in text may exist. For example, DOMA has applications in immigration enforcement, an area in which broad discretion is vested in the executive. After this Lecture was delivered, the Departments of Justice and Homeland Security stated that the Obama administration would not grant relief to the entire category of cases affected by DOMA, but that it would continue to exercise discretion in individual cases based on the particular factors of each situation; the administration did not specify, however, whether a same-sex marriage is a factor that weighs in favor of the exercise of discretionary relief. *See*

In analyzing the executive's duty to enforce and defend statutes, the start of wisdom comes in recognizing two points. First, the executive makes constitutional decisions in a broad range of settings: they include recommending, opposing, or vetoing legislation; starting or ending a prosecution or issuing a pardon; responding to court orders; defending statutes in litigation; and nominating judges to the bench. The appropriate scope of independent executive judgment varies across these settings. On the one hand, most commentators, even those generally subscribing to departmentalism, concede that the president may not defy a judicial order to comply with (the court's interpretation of) the Constitution;³¹ on the other, even the most dedicated judicial supremacist would not doubt that the president

Letter from Nelson Peacock, Assistant Sec'y, Office of Legislative Affairs, U.S. Dep't of Homeland Sec. & Ronald Weich, Assistant Attorney Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to Senator John Kerry 1 (May 17, 2011) (on file with the *Duke Law Journal*) ("Neither DHS nor DOJ has granted any form of relief to the entire category of cases affected by DOMA."). One newspaper reported that after the decision to refuse to defend DOMA, the administration cancelled the deportation of a male alien who was married to an American man, on the basis that the alien's deportation "[wa]s not an enforcement priority at this time." Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, June 30, 2011, at A16. Some weeks later, another newspaper criticized an immigration decision denying an alien permission to petition for permanent residency status based on his same-sex marriage. Editorial, *Couple Without a Country*, WASH. POST, Aug. 16, 2011, at A14; see also *Revelis v. Napolitano*, No. 11 C 1991, 2012 WL 28765, at *8-9 (N.D. Ill. Jan. 5, 2012) (denying a motion to dismiss for lack of jurisdiction in a lawsuit by a same-sex couple challenging DOMA in the context of an immigration hearing).

31. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 259-65 (1962); DANIEL FARBER, *LINCOLN'S CONSTITUTION* 182-88 (2003); Easterbrook, *supra* note 20, at 926; David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 312 (1992); John Harrison, *Judicial Interpretive Finality and the Constitutional Text*, 23 CONST. COMMENT. 33, 42 (2006); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 153-54 (1999); Meese, *supra* note 12, at 987 n.26; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008-09 (1965).

A few commentators do contend that the president may properly defy a judgment. See, e.g., Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 12 n.40 (2007); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 83 IOWA L. REV. 1267, 1313-29 (1996); Paulsen, *supra* note 19, at 276-84. For a nuanced discussion contending that there is "no perfect solution" to the allocation of power between courts and the president, that all things considered, the best solution is to recognize that judgments bind the executive, that there may be rare cases in which the executive is morally justified in defying judgments, and that ultimately the responsibility for executive compliance with judgments rests with "Congress and the people," see Richard H. Fallon, Jr., Lecture, *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1. See generally William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008) (arguing that the president must enforce judgments of the judiciary unless the issuing court lacked jurisdiction).

may nominate judges whose views depart from those prevailing on the Supreme Court.

The second point is that Congress, too, is a department of government, and when it passes bills, it makes a determination that they are constitutional, at least implicitly—and in the case of both Don't Ask, Don't Tell and DOMA, explicitly.³² Thereafter, when a legislative act is challenged in court as unconstitutional, the legal defense is not provided by Congress, the body that enacted it,³³ but by the executive. Thus, the question of the executive's obligation to enforce and defend implicates Article II's requirement that the president "take Care that the Laws be faithfully executed."³⁴

Here, as elsewhere, the implications of the Take Care Clause³⁵ are disputed. Some have argued that a president must defend a statute with all his powers unless and until the courts bar enforcement. That view was voiced, for example, by Representative George Boutwell, one of the House managers of the impeachment proceedings against President Andrew Johnson.³⁶ Johnson had refused to comply with the Tenure of Office Act,³⁷ which required the consent of the Senate to discharge heads of Cabinet departments. Believing the requirement to be unconstitutional—a position the

32. As to Don't Ask, Don't Tell, see S. REP. NO. 103-112, at 272, 285 (1993).

As to DOMA, the constitutional issues were vetted in hearings before the House. The House Committee Report explicitly concluded that DOMA was constitutional and referenced the same conclusion of the Department of Justice, with some members filing a dissenting report. H.R. REP. NO. 104-664, at 32-34, 36-45 (1996). At about the time that the bill passed the House, the Senate Judiciary Committee held hearings at which issues concerning the Act's constitutionality were discussed, and, again, the administration's view of the constitutional issue was noted. See *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 2 (1996) (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary). A Senate report on the bill does not appear to exist, but the floor debate before passage adverted to the constitutional issue and again to the Justice Department's view. See, e.g., 142 CONG. REC. 22,437 (statement of Sen. Trent Lott) ("[President Clinton's] Department of Justice has affirmed its position that H.R. 3396 'would be sustained as constitutional if challenged in courts.'").

33. Although the bill enacted by Congress must have been presented to the president for his signature, even when a bill is enacted into law by congressional override of a presidential veto—so that the statute is truly the act of the legislature alone—the executive remains responsible for defending its constitutionality in court.

34. U.S. CONST. art. II, § 3; see also David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 117 (1993).

35. U.S. CONST. art. II, § 3.

36. See HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW* 456 (1982).

37. Tenure of Office Act, ch. 154, 14 Stat. 430 (1867) (repealed 1887).

Supreme Court upheld more than half a century later in *Myers v. United States*³⁸—Johnson sought to remove Secretary of War Edwin Stanton without senatorial consent.³⁹ That action sparked his impeachment, and, during the proceedings, Boutwell declared that the president is obliged to execute all laws and lacks the power to refuse to execute those that he views as unconstitutional.⁴⁰

The same position has been advanced outside of that highly charged political setting, by such estimable scholars as Professors Edward Corwin and Eugene Gressman.⁴¹ On this view, a failure to enforce a federal statute violates the president’s duties under the Take Care Clause and can be seen as a presidential effort to assume a nonexistent power to repeal by fiat a validly enacted statute. These commentators suggest that although presidential objections to constitutionality may be registered by exercise of the veto, once a law is enacted—whether or not over a veto—any constitutional concerns must be set aside, and the law must be enforced.⁴²

That absolutist view, however, seems difficult to endorse, because the president must also take care to enforce the Constitution,⁴³ which, of course, trumps conflicting statutes.⁴⁴ More

38. *Myers v. United States*, 272 U.S. 52 (1926).

39. HYMAN & WIECEK, *supra* note 36, at 455.

40. See 2 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 73 (Washington, Gov’t Printing Office 1868) (“The constitutional injunction upon the President is to take care that the laws be faithfully executed, and upon him no power whatsoever is conferred by the Constitution to inquire whether the law that he is charged to execute is or is not constitutional.”).

41. See EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 72 (5th rev. ed. 1984); Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382 (1986). The similar view of Professor Christopher May is conveyed by the title of his article. See Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 977 (1994); see also *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1126 (9th Cir. 1988) (awarding attorneys’ fees after concluding that the government had acted in bad faith when the executive branch refused to enforce a statute that it believed encroached on executive power), *withdrawn in part per curiam*, 893 F.2d 205 (9th Cir. 1989) (en banc).

42. CORWIN, *supra* note 41, at 72; Gressman, *supra* note 41, at 382–83.

43. A textualist might object that the Take Care Clause requires faithful execution of the “laws” but not the “Constitution,” while noting that in other clauses of the Constitution, most references to “laws” refer to acts of Congress. A list compiled by Professor Edward Swaine includes:

[U.S. CONST.] art. I, § 2, cl. 3 (enabling Congress to direct census “by Law”); *id.* art. I, § 4, cl. 1 (to regulate elections “by Law”); *id.* art. I, § 4, cl. 2 (to set times of assembly “by Law”); *id.* art. I, § 6, cl. 1 (noting that compensation for legislators is to be “ascertained by Law”); *id.* art. I, § 7 (describing presentment and other procedures before bill can become “a Law”); *id.* art. I, § 8, cl. 4 (giving Congress power to

concretely, consider Judge Frank Easterbrook's example of the executive's response to Supreme Court decisions in the 1970s invalidating legislative classifications based upon sex.⁴⁵ The U.S. Code was replete with such classifications.⁴⁶ But defending each provision to the death until the Supreme Court struck it down would have been pointless.⁴⁷ Nor would such an absolutist view comport with executive practice. The Justice Department has for many years refused to defend statutes when there is no reasonable argument for their constitutionality.⁴⁸ And Congress appears to have acknowledged that practice, for it enacted a provision requiring congressional

prescribe "uniform Laws" on bankruptcy); *id.* art. I, § 8, cl. 18 (enabling Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers"); *id.* art. I, § 9, cl. 3 (prohibiting any "ex post facto Law"); *id.* art. I, § 9, cl. 7 (limiting expenditures to those appropriations "made by Law").

Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 342 n.64 (2008). Moreover, some constitutional provisions speak of both laws and the Constitution, *see, e.g.*, U.S. CONST. art. III, § 2 (extending the judicial power to cases "arising under this Constitution, the Laws of the United States, and Treaties"); *id.* art. VI (mentioning both the Constitution and the laws of any State), which a textualist might take to mean that "laws" does not include the Constitution.

This argument shows little more than the limitations of textualism, for surely the obligation of the executive to comply with the Constitution is implicit in the constitutional structure. *See* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 27 (2000). Moreover, another clause in the Constitution—Article II, Section 1, Clause 8, which prescribes the presidential oath—does expressly require the chief executive to pledge to preserve, defend, and protect the Constitution. *See* U.S. CONST. art. VI (stating that members of Congress and all executive and judicial officers of the United States, as well as their state government counterparts, "shall be bound by Oath or Affirmation, to support this Constitution").

44. *See* Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 31–36 (1992).

45. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 204 (1976) (holding unconstitutional a state law that set a different minimum age for men and women when purchasing certain beers); *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (holding unconstitutional a practice of determining dependency status in part based on sex).

46. *See generally* U.S. COMM'N ON CIVIL RIGHTS, SEX BIAS IN THE U.S. CODE (1977) (noting that "800 sections of the code . . . contained either substantive sex-based differentials or terminology inconsistent with a national commitment to equal rights, responsibilities, and opportunities").

47. *See* Easterbrook, *supra* note 20, at 914.

48. *See, e.g.*, *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 94th Cong. 83–84 (1976) (supplemental answer of the Dep't of Justice) ("Where there is a patent inconsistency between the Constitution and an act of Congress, the Department, representing the United States, must argue that the Constitution prevail.").

notification precisely when the executive fails to enforce or defend an act of Congress.⁴⁹

At the other end of the spectrum is the view that the president has the power—or, more extreme still, the duty—to refuse to enforce any statute that he judges to be unconstitutional, without regard to the views of Congress or the courts.⁵⁰ This strong departmentalist view sometimes invokes the notion that because unconstitutional laws are void, the president may not enforce them as law.⁵¹ The difficulty, of course, is that the argument begs the question of whose judgment that a duly enacted law is void should control.⁵² Another argument for independent constitutional review rests on the presidential oath of office in Article II, which requires that the president pledge to “preserve, protect, and defend the Constitution.”⁵³ But the oath argument proves too much. Article VI requires all executive officers to swear to support the Constitution,⁵⁴ yet all of them are surely not obliged to apply their personal views of the Constitution, regardless of the views of their department head, of the Justice Department, or even of the president.⁵⁵ And if executive officials may defer to the constitutional views of other executive officials, why can’t they defer to officials in other branches—that is, to members of Congress? After

49. See 28 U.S.C. § 530D (2006) (requiring the attorney general to submit a report to Congress when, *inter alia*, executive officials establish a policy to refrain from enforcing a provision of an act of Congress, determine not to defend such a provision, or decide not to appeal a decision adversely affecting the constitutionality of such a provision).

50. Judge Frank Easterbrook appears to take the view that the president has the power to engage in independent review but does not suggest that he must do so in every case. See Easterbrook, *supra* note 20, at 922–23. Professor Saikrishna Prakash goes further, suggesting a presidential duty to disregard unconstitutional enactments. See Saikrishna Bangalore Prakash, *The Executive’s Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1682 (2008); see also Michael B. Rappaport, *The Unconstitutionality of “Signing and Not-Enforcing,”* 16 WM. & MARY BILL RTS. J. 113, 122–23, 129 (2007) (contending that if the president has the power not to enforce an unconstitutional statute, exercise of that power is mandatory, not discretionary, and that whether or not he has a general power not to enforce, he is obliged to veto bills that he intends not to enforce).

51. Prakash, *supra* note 50, at 1616.

52. See CORWIN, *supra* note 20, at 5–6 (“[E]ither . . . everybody—including judges—has an equal right to determine what laws he is bound by, or else . . . nobody is bound by a law which has been held to be unconstitutional by proper authority, which of course leaves the essential question of the location of such authority undetermined.”).

53. U.S. CONST. art. II, § 1; see also Prakash, *supra* note 50, at 1616.

54. U.S. CONST. art. VI.

55. Cf. Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 374–75 (1994) (“[C]ould these officers refuse to carry out presidential orders, forcing the President at a minimum to pay the political costs of dismissing them?”).

all, federal judges, who also take an oath to support the Constitution,⁵⁶ often defer to the political branches.⁵⁷

Much the same problem inheres in any claim that the Take Care Clause obliges the president to engage in independent constitutional review, for whether taking care to enforce the Constitution in a system of coordinated and separated powers permits deference to another branch is the very question before us.⁵⁸ Indeed, Professor Michael Paulsen, perhaps the leading departmentalist, concludes his impressive analysis by urging the executive branch, in exercising its power of constitutional determination, to defer to the considered views of other branches, noting in particular that “[l]aw interpretation is what courts do for a living. They are supposed to be good at it.”⁵⁹

Having framed the broad debate about executive review, I turn to exploring the historic practice of the executive branch in enforcing and defending statutes to see how it illuminates this debate.

II. CONSTITUTIONAL PRACTICE IN THE EXECUTIVE BRANCH

Executive-branch lawyers deal with constitutional issues frequently, and not merely, or perhaps even most often, in litigation. For example, a broad range of administrative decisions present constitutional questions; the Department of Justice routinely reviews the constitutionality of pending bills;⁶⁰ law-enforcement and national-security officials often have to consider the constitutionality of

56. U.S. CONST. art. VI.

57. See Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1105, 1114 (1987); see also Strauss, *supra* note 34, at 117–18, 126–27 (arguing that the president’s power to disregard a statute may be limited by his duty to defer to the constitutional judgment of Congress).

58. See David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 90 (2000) (“[A]n expansive conception of presidential authority . . . would be blind to the ways in which constitutional doctrine itself suggests that the scope of an institution’s interpretive authority is defined by a structure in which there are three branches sharing power rather than one branch exercising all of it.”).

59. Paulsen, *supra* note 19, at 332, 335.

60. Nina Pillard, a veteran of the Office of Legal Counsel (OLC), reports that in her experience, OLC reviewed every bill that the Justice Department’s Office of Legislative Affairs viewed as having a significant chance of passage. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 711–12 & n.110 (2005); see also Trevor Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1709–12 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)) (“OLC’s core function is to provide formal legal advice through written opinions.”).

proposed actions;⁶¹ and demands from Congress for information may raise a range of separation-of-powers issues.⁶² In these and other settings, executive lawyers, most of whom are career lawyers,⁶³ generally do not engage in *independent* constitutional interpretation. Instead, they operate within the framework of established *judicial* doctrine⁶⁴—at least as to matters that present justiciable questions.⁶⁵ Indeed, whatever the force of departmentalism in theory, it is difficult to imagine a comprehensive practice of independent executive constitutional interpretation. The executive branch simply lacks the capacity to create a parallel universe of constitutional determinations, tracking all the issues on which judicial precedents exist.⁶⁶ Thus, although a great many scholars adhere to some form of departmentalism, that view has much less of a grip on government

61. See, e.g., CAROLINE D. KRASS, OFFICE OF LEGAL COUNSEL, AUTHORITY TO USE MILITARY FORCE IN LIBYA 1 (2011), available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> (discussing whether “the President had the constitutional authority to direct the use of force in Libya”); Charlie Savage, *Secret U.S. Memo Made Legal Case To Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, at A1 (describing an undisclosed memo from OLC that analyzed the constitutionality of using lethal force against an American citizen located in Yemen and asserted to be a cobelligerent of al Qaeda).

62. See, e.g., *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 55–57 (D.D.C. 2008) (refusing to grant former White House Counsel Harriet Miers immunity from being compelled to testify before the House of Representatives about the forced resignations of nine U.S. attorneys in 2006 and addressing the “important separation of powers concerns” raised by the interbranch conflict).

63. See Pillard, *supra* note 60, at 708, 713.

64. See, e.g., Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 408; Merrill, *supra* note 31, at 67–68; Geoffrey P. Miller, *The President’s Power of Constitutional Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35, 37 (1993); Pillard, *supra* note 60, at 683, 703–04, 740–43.

65. An important feature of executive-branch lawyering involves questions, including constitutional questions, that are not justiciable, often in the separation-of-powers or foreign affairs areas. See Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010) (“[B]ecause many of the issues addressed by OLC are unlikely ever to come before a court in justiciable form, OLC’s opinions often represent the final word in those areas . . .”).

66. See Pillard, *supra* note 60, at 736–39.

actors—certainly and perhaps unsurprisingly on judges,⁶⁷ but more importantly for present purposes, also on executive officials.⁶⁸

Like the courts, executive-branch lawyers are strongly influenced by precedent.⁶⁹ It is thus highly relevant to note how very rarely the executive branch fails to enforce or defend acts of Congress. Consider, for example, that in the forty years from the start of the Nixon administration to the end of the George W. Bush administration, the Supreme Court invalidated roughly eighty federal statutes,⁷⁰ while other federal statutes were invalidated in decisions never appealed to the Supreme Court.⁷¹ There can be little question that executive lawyers seriously doubted the constitutionality of a good number of these statutes—or that the president would have too had he been consulted. But several presidents and their administrations nonetheless enforced and defended the statutes in question.

Thus, one can say in general that refusals by the executive branch to defend or enforce acts of Congress are extraordinarily rare. But they do occur, and the exceptions fall into several clusters.

A. *Statutes for Whose Constitutionality No Colorable Argument Can Be Advanced*

The most common basis for refusing to defend a statute is that no colorable argument that the statute is valid can be made. A well-known example, *Dickerson v. United States*,⁷² involved a statute,

67. See, e.g., *City of Boerne v. Flores*, 512 U.S. 507, 529 (1997); *United States v. Nixon*, 418 U.S. 683, 704 (1974); *Cooper v. Aaron*, 358 U.S. 1, 17 (1958); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1122 (9th Cir. 1988), *withdrawn in part per curiam*, 893 F.2d 205 (9th Cir. 1989) (en banc).

68. See, e.g., *Johnsen*, *supra* note 18, at 106 (noting that the doctrine of judicial supremacy, rather than departmentalism, “is unquestionably the dominant view in United States law, politics, and society”).

69. See *Morrison*, *supra* note 65, at 1492–94; Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1323–25 (2000).

70. See generally S. DOC. NO. 108-17, at 2117–59 (2004) (listing the seventy-four statutes invalidated by Supreme Court decisions from 1969 to 2002); S. DOC. NO. 110-17, at 163–64 (2008) (listing the five additional statutes invalidated by the Court from 2002 to 2008).

71. E.g., *Doe v. Mukasey*, 549 F.3d 861, 885 (2d Cir. 2008); *Nelson v. La Crosse Cnty. Dist. Attorney*, 301 F.3d 820, 838 (7th Cir. 2002); *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1077 (10th Cir. 2001); *Reardon v. United States*, 947 F.2d 1509, 1523 (1st Cir. 1991); *Rothe Dev. Corp. v. Dep’t of Def.*, 606 F. Supp. 2d 648, 653 (W.D. Tex. 2009); *ACLU v. Mineta*, 319 F. Supp. 2d 69, 86–87 (D.D.C. 2004); *Gavett v. Alexander*, 477 F. Supp. 1035, 1049 (D.D.C. 1979).

72. *Dickerson v. United States*, 530 U.S. 428 (2000).

enacted two years after the *Miranda* decision,⁷³ providing that confessions in federal prosecutions are admissible if voluntary—whether or not *Miranda* warnings had been administered.⁷⁴ The Department of Justice, under a series of different administrations, had essentially disregarded the statute, apparently viewing it as inconsistent with *Miranda*.⁷⁵ After one court of appeals nonetheless relied on the statute in ruling that a confession was admissible without regard to compliance with *Miranda*, the solicitor general refused to defend the statute before the Supreme Court,⁷⁶ and the Supreme Court agreed that it was invalid.⁷⁷

Obviously, judgments about whether a colorable argument for a statute’s validity exists will sometimes be contestable. For example, in *Dickerson*, two dissenting Justices voted to uphold the statute.⁷⁸ But however contestable particular judgments may be, the *practice* of refusing to defend a statute when colorable arguments cannot be mustered to support its constitutionality has been consistently followed by recent administrations and provokes little controversy.⁷⁹

B. Separation-of-Powers Cases

The strong tradition of defending acts of Congress also does not extend to separation-of-powers cases—at least not to those that involve a conflict between legislative and executive powers. A distinguished former head of the Office of Legal Counsel, Walter Dellinger, noted the executive’s “enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional

73. *Miranda v. Arizona*, 384 U.S. 436 (1966).

74. *See* 18 U.S.C. § 3501 (2006).

75. *See* *Davis v. United States*, 512 U.S. 452, 463 (1994) (Scalia, J., concurring); *United States v. Dickerson*, 166 F.3d 667, 681–82 (4th Cir. 1999), *rev’d*, 530 U.S. 428 (2000); Eric D. Miller, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1033–35 (1998).

76. *See* Reply Brief for the United States at 1, *Dickerson*, 530 U.S. 428 (No. 99-5525), 2000 WL 374574, at *1.

77. *See* *Dickerson*, 530 U.S. at 432.

78. *See id.* at 465 (Scalia, J., dissenting).

79. *See* Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1083 (2001); *see also*, e.g., *Representation of Congress and Congressional Interests in Court*, *supra* note 48, at 5–6 (statement of Rex E. Lee, Assistant Attorney Gen., Civil Div., U.S. Dep’t of Justice); Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 50 (1990); Attorney General’s Duty To Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 56 n.1 (1980).

powers of the Presidency”⁸⁰—a position that has been followed consistently by presidential administrations.⁸¹

I have already discussed President Johnson’s refusal to enforce the Tenure of Office Act.⁸² A more recent example, notable because it may be the first time that the executive branch enforced a statute but then refused to defend its constitutionality in court, is *United States v. Lovett*.⁸³ There, an appropriations statute enacted during World War II prohibited paying the salaries of three named federal employees.⁸⁴ President Franklin D. Roosevelt stated that he had felt obliged to sign the bill because it appropriated funds essential to government activities during the congressional recess, but that he thought the appropriations rider both infringed executive power and constituted a bill of attainder.⁸⁵ When the employees sued for the pay they had been denied, the executive branch stated that it could not advocate with conviction the views of Congress and suggested that Congress should be represented by its own counsel, as it later was.⁸⁶ After the employees prevailed in the Court of Claims on grounds that did not address the broader constitutional issues, the Department of Justice filed a petition for certiorari, at the request of the special counsel for Congress, to permit the constitutional questions to be

80. Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994).

81. See, e.g., Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att’y Gen. 56, 64 (1933); Attorney General’s Duty To Defend the Constitutionality of Statutes, 43 Op. Att’y Gen. 325, 325 (1981).

82. See *supra* text accompanying notes 36–39.

83. *United States v. Lovett*, 328 U.S. 303 (1946).

84. Urgent Deficiency Appropriation Act, 1943, ch. 218, § 304, 57 Stat. 431, 450.

85. See President Franklin D. Roosevelt, Statement of the President Condemning Rider Prohibiting Federal Employment of Three Named Individuals (Sept. 14, 1943), reprinted in 1943 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 385, 385 (Samuel I. Rosenman ed., 1950) (“On July 12 I reluctantly signed H. R. 2714, the urgent Deficiency Appropriation Act, 1943. I felt obliged to approve it because it appropriates funds which were essential to carry on the activities of almost every agency of Government during the recess of the Congress. If it had been possible to veto the objectionable rider, . . . I should unhesitatingly have done so.”).

86. See H.R. REP. NO. 78-1117, at 3–4 (1944) (statement of Francis Biddle, Att’y Gen. of the United States). Pursuant first to a house resolution, H.R. Res. 386, 78th Cong., 89 CONG. REC. 10,882 (1943) (enacted), and then to a joint resolution, see Joint Resolution of Mar. 4, 1944, ch. 84, 58 Stat. 113, a special counsel was appointed to appear as amicus on behalf of Congress in defense of the statute.

resolved in the Supreme Court.⁸⁷ In defense of that approach, the Department stated that Congress had no independent means of access to the Court.⁸⁸ Before the Supreme Court, the Department of Justice's lead argument was that the Act invaded executive authority; the bill-of-attainder objection, on which the Supreme Court ultimately rested, was distinctly secondary.⁸⁹

From one perspective, it may seem perverse that the executive departs from its strong tradition of defending acts of Congress in cases in which the executive could be seen as self-interested.⁹⁰ But an adequate response, I believe, is that the executive branch cannot routinely enforce and defend a provision like the one in *Lovett*, for example, without leaving *undefended* the equally important interest of the executive in resisting legislative encroachments.⁹¹ Indeed, Justice Jackson's celebrated concurrence in the *Steel Seizure* case,⁹² while stating that presidential power is at its lowest ebb when executive actions are taken in contravention of congressional will, acknowledged that power to so act may nonetheless still exist.⁹³ It is a fair implication of that acknowledgment that the president need not reflexively enforce and defend congressional encroachments upon executive authority, and that approach has been consistently followed in recent years.⁹⁴

87. See Petition for Writ of Certiorari at 6, *Lovett*, 328 U.S. 303 (No. 809), reprinted in 44 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 5, 10 (Philip B. Kurland & Gerhard Casper eds., 2001).

88. Brief for the United States at 2, *Lovett*, 328 U.S. 303 (No. 809), reprinted in 44 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 87, at 52, 53.

89. See John Hart Ely, *United States v. Lovett: Litigating the Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1, 16 (1975). The statute at issue in *Lovett* has also been viewed as patently unconstitutional. See *Representation of Congress and Congressional Interests in Court*, *supra* note 48, at 6, 10 (statement of Rex E. Lee, Assistant Attorney Gen., Civil Div., U.S. Dep't of Justice).

90. See Johnsen, *supra* note 43, at 51.

91. Notably, many of the historical sources, such as the *Federalist* papers, on which departmentalist commentators rely, are concerned with interbranch disputes. See, e.g., Paulsen, *supra* note 19, at 220–36.

92. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

93. See *id.* at 634–38 (Jackson, J., concurring).

94. For example, presidents have refused to defend such measures as the independent-counsel provisions of the Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 601–602, 92 Stat. 1824, 1867–74 (codified as amended at 28 U.S.C. §§ 49, 591–598 (2006)), see Brief for the United States as Amicus Curiae Supporting Appellees at 3, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279), 1988 WL 1031600, at *5, and the legislative veto, see Brief for the Immigration and Naturalization Service at 34, *INS v. Chadha*, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170 & 80-2171), 1982 WL 607220, at *35; Constitutionality of Congress' Disapproval

C. *Constitutional Doubts and Executive Defense*

For my purposes, the most interesting cases, though very few in number, are those in which the executive refuses to defend a statute that involves no incursion upon executive authority, even though colorable arguments for the statute's constitutionality could be advanced. One such example arose during the George H.W. Bush administration. The *Metro Broadcasting* case⁹⁵ challenged the constitutionality of the FCC's granting minority preferences when awarding broadcast licenses.⁹⁶ A 1982 amendment to the Communications Act of 1934⁹⁷ mandated such preferences in a different kind of proceeding,⁹⁸ but in the matter at issue in *Metro Broadcasting*, the Act neither required nor forbade such preferences. Against that backdrop, the Department of Justice did not claim that the commission had exceeded its statutory authority in promulgating the minority-preference policy. Moreover, Congress could be viewed as having ratified the policy when it subsequently enacted a series of appropriations riders barring the use of funds for the policy's repeal or reexamination.⁹⁹ Thus, the lawsuit necessarily challenged the constitutionality of the Federal Communications Act insofar as it authorized the promulgation of rules providing for a minority preference. Before the Supreme Court—in a brief signed by Acting Solicitor General John Roberts—the Department of Justice argued that the minority preference was unconstitutional.¹⁰⁰ That did not leave the statute entirely undefended, as the FCC, an independent agency, filed briefs in the court of appeals and—with the authorization of the Department of Justice—in the Supreme Court,

of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21, 21–22 (1980); Statement on Signing the Treasury, Postal Service, and General Government Appropriations Act, 1994, 2 PUB. PAPERS 1855, 1855–56 (Oct. 28, 1993); Memorandum from President Franklin D. Roosevelt to Robert H. Jackson, Attorney Gen. of the U.S. (Apr. 7, 1941), reprinted in Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357–59 (1953).

95. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

96. *Id.* at 552.

97. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

98. *See* Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115(c)(1), 96 Stat. 1087, 1094 (codified at 47 U.S.C. § 309(i)(3)(A) (2006)) (requiring such preferences through the assignment by lottery of certain low-power stations).

99. *See* Brief for Federal Communications Commission at 11, *Metro Broad.*, 497 U.S. 547 (Nos. 89-453 & 89-700), 1990 WL 505688, at *11.

100. *See* Brief for the United States as Amicus Curiae Supporting the Petitioner at 7, *Metro Broad.*, 497 U.S. 547 (Nos. 89-453 & 89-700), 1989 WL 1126975, at *7.

contending that the minority preference was valid.¹⁰¹ In the end, the Supreme Court upheld the minority preference in a 5–4 decision (although that decision was effectively overturned a few years later, also by a 5–4 margin).¹⁰²

In *Metro Broadcasting*, the Department of Justice may have been frustrated by rules established by an independent agency that the Department viewed as unconstitutional but over which neither it nor the president could exercise control. But it remains the case that the Justice Department, which ordinarily represents the FCC and other independent agencies before the Supreme Court,¹⁰³ instead weighed in against the constitutionality, as applied, of a federal statute. And whatever one’s view on the merits, few observers would have contended that no colorable argument for the statute’s constitutionality could have been advanced in *Metro Broadcasting*.¹⁰⁴

Another decision to refuse to defend a statute that was not plainly unconstitutional arose in 1996 under a provision of an omnibus defense bill that required the discharge from the armed forces of HIV-positive individuals.¹⁰⁵ President Clinton signed the bill, but then, after determining that the secretary of defense and the chairman of the Joint Chiefs of Staff did not believe that the provision

101. See Brief for Federal Communications Commission, *supra* note 99, at 22, 1990 WL 505688, at *22 (“The distress sale policy is within Congress’ broad power under the commerce clause and the fourteenth amendment.”); Brief for the United States as Amicus Curiae Supporting the Petitioner, *supra* note 100, at 1 n.2, 1989 WL 1126975, at *1 n.2 (stating that in view of the position of the United States, the acting solicitor general was permitting the FCC to represent itself in the Supreme Court through its own attorneys, and citing 28 U.S.C. § 518(a) (1988)). On the division of litigating authority between the FCC and the Justice Department, see Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 299 (1993).

102. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

103. See 28 U.S.C. § 518(a) (2006).

104. The Department of Justice, in urging the statute’s unconstitutionality, might have taken the view that the position it was advancing would help to uphold the constitutionality of other federal statutes—for example, the federal civil rights laws insofar as they bar discrimination against white citizens. If congressional power to apply those laws to such discrimination would otherwise be hard to establish—under, for example, the Commerce Clause or the spending power—then the Department of Justice might have argued that its position in *Metro Broadcasting* sacrificed an application of the Federal Communications Act to preserve applications of federal civil rights laws. But although the government’s brief alluded generally to the federal government’s interest in enforcing federal civil rights laws, it did not make the more focused argument just described. See Brief for the United States as Amicus Curiae Supporting the Petitioner, *supra* note 100, at 1, 1989 WL 1126975, at *1.

105. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 567, 110 Stat. 186, 328, *repealed by* Act of Apr. 26, 1996, Pub. L. No. 104-134, § 2707, 110 Stat. 1321, 1321-330.

concerning HIV-positive service members served any legitimate interest, the administration announced that it viewed the provision as unconstitutional and would not defend it.¹⁰⁶ As others have noted, the courts very possibly would have upheld its constitutionality.¹⁰⁷ (In the end, Congress repealed the provision before the executive was required to take action, and thus the courts had no occasion to adjudicate the provision's constitutionality.)¹⁰⁸

But one finds these two examples, and a very few others,¹⁰⁹ discussed repeatedly in the literature—and to this list, DOMA will

106. See Press Briefing, Jack Quinn, Counsel to the President & Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice (Feb. 9, 1996), available at <http://archives.clintonpresidentialcenter.org/?u=020996-press-briefing-by-quinn-and-dellinger-on-hiv-provision.htm>.

107. See H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 382–83 (1998) (“[I]t would be difficult to claim that it would be irrational for Congress to conclude that treating HIV-positive individuals for combat injuries would require safeguards otherwise unnecessary, and that as a consequence their presence in combat units would complicate health care under combat conditions. Nondeployability inte [sic] combat units is an established basis for military classifications, and it seems doubtful that a court would have concluded that there was no ‘reasonably conceivable state of facts’ justifying Section 567’s discrimination.” (footnotes omitted) (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993))); see also Johnsen, *supra* note 43, at 56 (“The HIV provision cannot be described as clearly unconstitutional under prevailing judicial precedent . . .”).

108. See Act of Apr. 26, 1996, Pub. L. No. 104-134, § 2707, 110 Stat. 1321, 1321-330.

109. One instance dating back to the Kennedy administration is found in *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963). In that case, the statute, unlike Don’t Ask, Don’t Tell or DOMA, did not directly regulate the operations of the federal government. Rather, a provision of the Hospital Survey and Construction (Hill-Burton) Act, ch. 958, 60 Stat. 1041 (1946) (codified as amended at 42 U.S.C. § 291–291m (2006)), explicitly authorized the use of federal funds to support hospitals that provided separate-but-equal services to African-Americans, *id.* sec. 2, § 622(f), 60 Stat. at 1043. In a private discrimination suit against private hospitals that received federal funds, the Department of Justice intervened on the plaintiffs’ side, arguing that the involvement of federal and state governments rendered the hospitals’ conduct state action and, therefore, a denial of equal protection—a position with which the court of appeals agreed. *Simkins*, 323 F.2d at 962, 970.

In *League of Women Voters of California v. FCC*, 489 F. Supp. 517 (C.D. Cal. 1980), President Carter’s Department of Justice took the view that no reasonable argument existed for the constitutionality of a 1967 enactment prohibiting noncommercial television licensees from editorializing or endorsing or opposing candidates for public office, *id.* at 518. President Reagan’s Department of Justice disagreed and defended the measure, which the Supreme Court invalidated in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

In *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993), after Congress had overridden President George H.W. Bush’s veto of the “must-carry” provisions requiring cable operators to carry local and noncommercial programming, the Bush administration refused to defend the statute, *id.* at 36. Whether the Department of Justice or the president believed that no colorable argument in favor of constitutionality could have been advanced is unclear. See Letter from Andrew Fois, Assistant Attorney Gen., Office of Legislative Affairs, U.S. Dep’t of Justice, to Senator Orrin G. Hatch, Chairman, Senate Comm.

now be added—precisely because it is so extraordinarily unusual for the Department of Justice, outside of the separation-of-powers area, not to present colorable arguments in defense of a federal statute. Indeed, a notable example of the *strength* of the practice of defending acts of Congress involves the Voting Rights Act Amendments of 1970.¹¹⁰ During consideration of that measure, then-Assistant Attorney General William Rehnquist testified that there was “the most serious doubt” that Congress had the constitutional authority to lower the voting age to eighteen,¹¹¹ and President Nixon’s signing statement set forth his unqualified belief that Congress lacked the constitutional power to do so.¹¹² But in his Supreme Court argument in *Oregon v. Mitchell*,¹¹³ Solicitor General Erwin Griswold, after acknowledging those statements,¹¹⁴ proceeded to defend the provision.¹¹⁵ A similar sequence occurred three decades later: President George W. Bush expressed constitutional concerns about the 2002 Bipartisan Campaign Reform Act,¹¹⁶ but again, the Justice Department defended the Act’s constitutionality.¹¹⁷

on the Judiciary (Mar. 22, 1996), *reprinted in* 1 J.L. 19, 26–27 (2011) (“[I]n the litigation challenging the constitutionality of the must-carry provisions, the Department of Justice, appearing on behalf of defendant FCC, informed the district court that it declined to defend the constitutionality of the must-carry provisions, ‘consistent with President Bush’s veto message to Congress.’” (quoting Defendants’ Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in This Case and Its Related Cases at 2, *Turner Broad. Sys.*, 819 F. Supp. 32 (Civ. A. Nos. 92-2247, 92-2292, 92-2494, 92-2495 & 92-2558))). When the Clinton administration took office, it defended the enactment, Brief for the Federal Appellees at 8–9, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (No. 95-992), 1996 WL 435560, at *8–9; Letter from Andrew Fois to Senator Orrin G. Hatch, *supra*, which the Supreme Court upheld by a 5–4 margin, *Turner Broad. Sys.*, 520 U.S. at 224–25.

110. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended in scattered sections of 42 U.S.C.).

111. *Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 91st Cong. 233–49 (1970) (statements of William H. Rehnquist, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice).

112. President Richard Nixon, Statement on Signing the Voting Rights Act Amendments of 1970, PUB. PAPERS 512, 512 (June 22, 1970).

113. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

114. See Transcript of Oral Argument, *Mitchell*, 400 U.S. 112 (No. 43, 44, 46 & 47), *reprinted in* 69 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 87, at 619, 632–33 (“When [the bill] was pending before the Senate . . . Deputy Attorney General Henry Kleindienst appeared . . . and presented the view of the President that the . . . [bill] should be done by constitutional amendment . . . And . . . Assistant Attorney General Rehnquist presented . . . a substantial statement against [the bill’s] constitutional validity . . .”).

115. *Id.*, *reprinted in* 69 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 87, at 635.

116. President George W. Bush, Statement on Signing the Bipartisan Campaign Reform Act of 2002, 1 PUB. PAPERS 503, 503 (Mar. 27, 2002).

117. See *McConnell v. FEC*, 540 U.S. 93, 113 (2003).

D. The Related Question of Positions in Amicus Briefs

A closely allied question is the appropriateness of the Department of Justice's taking a position in an amicus brief that would call into question the validity of one or more federal statutes. For example, in *District of Columbia v. Heller*,¹¹⁸ the United States' amicus brief argued that the Second Amendment does confer an individual right to possess firearms unrelated to militia activities and refused to argue that the District of Columbia gun-control measure at issue was, in any event, a constitutionally valid response to the

In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Department of Justice took a unique approach when defending the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972). President Nixon, in signing the original Act, had not expressed any constitutional concerns about the legislation. President Richard Nixon, Statement on Signing the Federal Election Campaign Act of 1971, PUB. PAPERS 165 (Feb. 7, 1972). Two years later, President Ford expressed his pleasure in signing a bill making significant amendments to the Act; he did then state a constitutional concern, albeit in a somewhat muted form: "And although I do have reservations about the first amendment implications inherent in the limits on individual contributions and candidate expenditures, I am sure that such issues can be resolved in the courts." See President Gerald R. Ford, Statement on the Federal Election Campaign Act Amendments of 1974, 2 PUB. PAPERS 303, 303-04 (Oct. 15, 1974).

Before the Supreme Court, the Department of Justice filed two briefs. The first, styled "Brief for the Attorney General and the Federal Election Commission," argued that the recording, disclosure, contribution, expenditure, and public-finance provisions of the Act did not violate the First Amendment. See Brief for the Attorney General and the Federal Election Commission, *Buckley*, 424 U.S. 1 (Nos. 75-436 & 75-437), 1975 WL 171459, at *37. In this respect, it was a typical government brief defending a statute.

The second brief, styled "Brief for the Attorney General as Appellee and for the United States as Amicus Curiae," had two parts. Brief for the Attorney General as Appellee and for the United States as Amicus Curiae, *Buckley*, 424 U.S. 1 (Nos. 75-436 & 75-437), reprinted in 84 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 87, at 383. The attorney general joined only the portion of the brief that argued that the Federal Election Commission's powers intrude on the executive branch's authority under Article II. With respect to a statute that the executive branch viewed as trenching on its constitutional authority, this, too, was a typical government brief, as is discussed in the next paragraph in text. On that separation-of-powers issue, the FEC filed still another brief, on its own, supporting the constitutionality of the enforcement provisions. Brief of the Federal Election Commission, *Buckley*, 424 U.S. 1 (Nos. 75-436 & 75-437), reprinted in 84 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 87 at 521. The remainder of the second Justice Department brief set forth the views of the United States on the First Amendment issues "as *amicus curiae* in the true sense of that phrase" and provided an essay analyzing both sides of the issues without taking a final position. Brief for the Attorney General as Appellee and for the United States as Amicus Curiae, *supra*, at 2, reprinted in 84 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 87, at 400. The extraordinary filing of two briefs on the same issue, one of which did not conclude that the statute was constitutional, surely signaled that the attorney general had very significant doubts about the Act's constitutionality under the First Amendment.

118. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

problem of handguns in high-crime urban areas.¹¹⁹ On both points, the opposite position was entirely plausible—it was in fact endorsed by four Justices¹²⁰—and, if accepted, would have made the defense of existing federal gun laws easier.

More notable still is the example of *Brown v. Board of Education*,¹²¹ in which the Brief of the United States as Amicus Curiae¹²² argued that racial segregation in schools was unconstitutional and that the doctrine of separate but equal should be overruled.¹²³ Various acts of Congress at least presupposed that the schools in the District of Columbia would be segregated, and the District of Columbia’s brief in *Bolling v. Sharpe*¹²⁴ took the view that these statutes mandated segregation.¹²⁵ By contrast, the United States argued that the statutes could—and under the doctrine of constitutional avoidance, should—be interpreted as presupposing but not requiring segregation.¹²⁶ Whatever the plausibility of the United States’ statutory interpretation, if that interpretation were rejected, the United States’ position on the constitutional matter surely undermined acts of Congress.

In the amicus setting, unlike instances in which the government is directly sued, the government has the option of simply not filing a brief—although an invitation from the Supreme Court to the solicitor general to file a brief is very hard to refuse. And ordinarily, another party to the case has the opportunity to advance the constitutional position under which closely related federal statutes would be valid. But when the United States does choose to participate, it seems difficult to distinguish positions taken in amicus briefs from positions taken in government briefs in lawsuits that directly challenge the

119. Brief for the United States as Amicus Curiae at 9–10, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 157201, at *9–10 (arguing that the Second Amendment confers an individual right to bear arms, that regulations infringing on that right “warrant close scrutiny,” and that the regulation at hand “may well fail such scrutiny”).

120. See, e.g., *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting); *id.* at 2847 (Breyer, J., dissenting).

121. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

122. Brief for the United States as Amicus Curiae, *Brown*, 347 U.S. 483 (Nos. 1, 2, 4 & 10), 1952 WL 82045.

123. *Id.* at 2–3, 17, 1952 WL 82045, at *2–3, *17.

124. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

125. Brief for Respondents at 12–14, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 8), 1952 WL 47280, at *12–14.

126. Brief for the United States as Amicus Curiae, *supra* note 123, at 15, 1952 WL 82045, at *15.

constitutionality of federal statutes. The situations, if not identical twins, are at least first cousins.

It is difficult to determine the number of cases in which the government has taken a position in an amicus brief that might undermine the defense of an existing statute.¹²⁷ But I suspect that the practice is quite rare. Indeed, the United States' amicus briefs often begin with a recitation that the federal government's interest in the case pertains to defending and enforcing federal statutes,¹²⁸ and that interest will ordinarily call for briefing that does not undermine the constitutionality of such federal enactments.

III. AN INSTITUTIONAL VIEW OF DEFENDING DON'T ASK, DON'T TELL AND DOMA

Against that background of historical practice, I want to offer a perspective on the defense of Don't Ask, Don't Tell and DOMA that seeks to relate broad theories of constitutionalism to an important cluster of institutional practices and realities. From this perspective, the question of whether the executive should enforce and defend

127. To be sure, the notion that amicus briefs should not undermine federal statutes could make the government's position depend upon the sequence of litigation. For example, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the United States argued that Nebraska's partial-birth-abortion ban was unconstitutional and that its enforcement could interfere with the ability of federal agencies to provide abortions to those for whose health care they are responsible. Brief for the United States as Amicus Curiae Supporting Respondent at 1, *Stenberg*, 530 U.S. 914 (No. 99-830), 2000 WL 340108, at *1. That position did not, to my knowledge, undermine any federal statute then on the books, as it predated enactment of the federal Partial Birth Abortion Ban Act of 2003, Pub. L. No 108-105, 117 Stat. 1201 (codified as amended at 18 U.S.C. § 1531 (2006)), which was later upheld in *Gonzales v. Carhart*, 550 U.S. 124 (2007).

The concept of avoiding arguments that undermine federal statutes has enough flexibility to accommodate reasonable concerns about effective advocacy and maintaining credibility with the courts. In the *Heller* litigation, for example, one cannot rule out the possibility that the solicitor general believed that the most effective way to uphold federal gun laws was to concede certain positions on which the government was unlikely to sway the majority, and thereby to establish the government's credibility, on which it could later draw when arguing that various federal statutes raised distinguishable questions. See *infra* text accompanying notes 180-95. A skeptic might note, in response, the similarities between the government's brief in *Heller* and the platform of the Republican Party. See REPUBLICAN NAT'L COMM., 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA 72 (2004), available at http://www.presidency.ucsb.edu/papers_pdf/25850.pdf.

128. Brief for the United States as Amicus Curiae Supporting the Respondent at 1-2, *Ewing v. California*, 538 U.S. 11 (2003) (No. 01-6978), 2002 WL 1798896, at *1-2; Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (No. 98-963), 1999 WL 280452, at *1; Brief for the United States as Amicus Curiae Supporting the Petitioner at 1-3, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (No. 83-1158) 1984 WL 566038, at *1-3.

these statutes is not the broad one of whether the president is a constitutional interpreter—for he must be—or whether he acts lawlessly when his constitutional views diverge from those of the courts—for he does not. Instead, the question is one of judgment—of the desirability, in view of an extant and reasonably stable set of institutional practices and expectations, of the president’s determining in a particular case that he will not enforce or defend a statute that is constitutionally dubious but that nonetheless can plausibly be defended.

In this Part, I lay out a range of considerations that support the practice of enforcing and defending acts of Congress that the executive branch believes to be misguided, offensive, and quite possibly unconstitutional—in which category I would place DOMA and Don’t Ask, Don’t Tell. These considerations include the division of labor between executive and congressional lawyers, the relationship between career and politically appointed lawyers within the executive branch, the preservation of the Justice Department’s credibility with the courts, the avoidance of friction with Congress, and the maintenance of the integrity of executive officials subject to Senate confirmation. I also consider, but find wanting as a basis for enforcing but not defending DOMA and Don’t Ask, Don’t Tell, claims that the executive branch has a superior capacity to engage in constitutional interpretation.

A. *Protecting the Interests of Congress*

A first point that bears on this question draws on an established feature of our system already noted: the *executive* branch defends acts of *Congress*.¹²⁹ It is sometimes said that if the executive refuses to defend, Congress may file a brief making the appropriate arguments. That is correct to a point, especially when a case reaches the Supreme Court¹³⁰ or when the constitutional issue does not turn on the factual

129. Of course, unless enacted over a presidential veto, the acts are also in some sense acts of the executive.

130. In suggesting that enforcing—but not defending—a statute ordinarily places the constitutional issue before the court, former Solicitor General Seth Waxman appears to have been focusing on Supreme Court litigation. See Waxman, *supra* note 79, at 1078 n.14 (“[T]he practice of ‘enforce but decline to defend’ . . . allows the Executive Branch to make its views known to the Court . . .”). In that context, an amicus brief from Congress may serve much the same function as a brief from the Department of Justice representing the United States and/or executive officials.

record.¹³¹ But there are a variety of reasons why this alternative might fall short.

In many cases—including particularly the challenge to Don't Ask, Don't Tell and, some might say, to DOMA—a court's judgment about constitutionality might depend on the evidentiary record assembled in the district court concerning the strength or weakness of the asserted government interests. Remember, after all, the Brandeis brief.¹³² And it is uncertain whether Congress or one of its houses may intervene as a party or simply file a brief as an amicus and whether, if it may intervene, it enjoys all of the rights of a party at the district court level to depose and summon witnesses, gather and introduce documents, and the like.¹³³ The Department of Justice has taken the

131. *Metro Broadcasting*, a case in which the litigation was based on the administrative record, furnishes an example. And in *Lovett*, although the case came to the Court of Claims without an agency record as such, the legal issues did not depend importantly on further factual development.

132. See Ruth Bader Ginsburg, *Muller v. Oregon: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 362 (2009) (“[In *Muller v. Oregon*, 208 U.S. 412 (1908), Louis Brandeis, as counsel,] superintended a brief unlike any the Court had seen. It was to be loaded with facts and spare on formal legal argument. Its success would depend on the Court's willingness to take judicial notice of a vast array of information outside the formal record of the case.”).

133. In *Lovett*, the solicitor general, in seeking certiorari on the question of the statute's constitutionality, noted that he had been requested to do so by the special counsel appointed to represent congressional interests, so that the Supreme Court could decide the constitutional question. See *supra* text accompanying notes 83–89. The premise of that statement appears to be that although Congress could file an amicus brief should the solicitor general's petition be granted, Congress could not on its own seek Supreme Court review.

In *INS v. Chadha*, 462 U.S. 919 (1983), by contrast, the Senate and House authorized intervention in the litigation, and the court of appeals granted the motion to intervene. When the case reached the Supreme Court, on the question of intervention it said only that “[b]oth Houses are therefore proper ‘parties’ within the meaning of that term in [the statute governing Supreme Court review of cases in the federal courts of appeals].” *Id.* at 930 n.5. Some years later, however, in *Raines v. Byrd*, 521 U.S. 811 (1997), the Court denied that individual legislators challenging the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), *invalidated* by *Clinton v. City of New York*, 524 U.S. 417 (1988), had standing to vindicate an asserted injury to their authority or power, *Raines*, 521 U.S. at 814, 830. The Court did make something of the fact that unlike in *Chadha*, the houses of Congress had not authorized suit and had indeed opposed it, but whether those observations were determinative is unclear. More generally, the tone of the *Raines* opinion is broadly skeptical of judicial review of interbranch disputes in which no party claims individualized injury. Thus, whether the basis for intervention in *Chadha* remains good law—and if so, whether it is limited to cases in which (a) the substantive constitutional issue involves a separation-of-powers challenge to legislative authority, and/or (b) both houses of Congress have specifically authorized intervention—remains to be seen. Moreover, intervention granted only on appeal—or in the district court, but only for purposes of briefing legal issues—may be a different matter from intervention at the trial level to engage in plenary litigation.

view that only the executive branch may represent the United States in litigation,¹³⁴ or—in at least one filing after this Lecture was delivered—that any intervention by Congress should be limited to presenting arguments in defense of a statute’s constitutionality.¹³⁵

Moreover, if both the defendants, represented by the Department of Justice, and the challengers agree that a provision is unconstitutional, the contrary view, presented in a congressional brief, might not fully register with the courts. Some judges, much as they are unlikely in a criminal case to impose a harsher sentence than the government recommends, may be unlikely to uphold a statute that the Department of Justice, along with the plaintiffs, contends is unconstitutional.

Finally, congressional defense of a statute—whether by intervention or merely by filing an amicus brief—is possible only if authorized in accordance with the varying procedures of one of the houses of Congress.¹³⁶ Whether such authorization is provided will

Since this Lecture was delivered, at least one district judge and one magistrate judge have permitted the House Bipartisan Legal Advisory Group (BLAG) to intervene as a party in a challenge to section 3 of DOMA and have rejected the Justice Department’s suggestion that intervention be limited to presenting arguments in defense of the statute. *Revelis v. Napolitano*, No. 11 C 1991, 2012 WL 28765, at * 8–9 (N.D. Ill. Jan. 5, 2012); *Windsor v. United States*, 797 F. Supp. 2d 320, 323–25 (S.D.N.Y. 2011). In its brief in *Windsor v. United States*, 797 F. Supp. 2d 320 (S.D.N.Y. 2011), BLAG cited quite a number of cases in which the House had been permitted to intervene. Memorandum of Points and Authorities in Support of the Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives To Intervene for a Limited Purpose at 3, *Windsor*, 797 F. Supp. 2d 320 (No. 10 Civ. 8435 (BSJ) (JCF)), 2011 WL 3164126, at *3. Nevertheless, some of these cases, such as *Chadha*, involved executive-legislative disagreements about the separation of powers, and in none of them did the congressional intervenor appear actually to have engaged in full-scale litigation in the district court, as distinguished from having defended the statute in connection with a motion for a preliminary injunction, a motion to dismiss for failure to state a claim, or a motion for summary judgment on a very limited record, such as affidavits.

134. Brief for the Attorney General as Appellee and for the United States as Amicus Curiae, *supra* note 117, at 116, reprinted in 84 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 87, at 514; see also *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam) (noting that the conduct of civil litigation may be undertaken only by persons who are “Officers of the United States” under Article II’s Appointments Clause); *Representation of Congress and Congressional Interests in Court*, *supra* note 48, at 83 (statement of Rex E. Lee, Assistant Attorney Gen., Civil Div., U.S. Dep’t of Justice) (“[T]he conduct of litigation in which the [U]nited States is interested should be reserved to the Department of Justice . . .”).

135. See *Windsor*, 797 F. Supp. 2d at 323 (“[T]he DOJ asks that BLAG’s involvement be limited to making substantive arguments in defense of Section 3 of DOMA while the DOJ continues to file all procedural notices.”).

136. Intervention or appearance as amicus curiae by the Senate Office of Legal Counsel must be authorized by a Senate resolution. 2 U.S.C. §§ 288b(c), 288e(a) (2006). In the House of Representatives, clause 8 of rule 2 of the House rules permits the speaker of the house, after

depend upon the political vicissitudes of the moment. In 2011, the House Bipartisan Legal Advisory Group, following a 3 to 2 party-line vote, did authorize filing a brief in defense of DOMA.¹³⁷ But that group, which consists of three members of the majority leadership and two members of the minority leadership, might have decided quite differently if—as in 2009 and 2010—the Democratic Party controlled the House. For all of these reasons and more,¹³⁸

consulting with the BLAG, to direct the Office of General Counsel or special counsel to intervene on behalf of the House of Representatives. H.R. Res. 5, 112th Cong. (2011) (enacted); *see also* 2 U.S.C. § 130f(a) (2006) (“The General Counsel of the House of Representatives . . . shall be entitled . . . to enter an appearance in any proceeding before any Court of the United States . . .”).

137. Press Release, Representative John Boehner, Speaker of the U.S. House of Representatives, House Will Ensure DOMA Constitutionality Is Determined by the Court (Mar. 9, 2011), *available at* <http://johnboehner.house.gov/News/DocumentSingle.aspx?DocumentID=228585>; Press Release, Representative Nancy Pelosi, Pelosi Letter to Speaker Boehner on House Counsel Defense of DOMA (Mar. 11, 2011), *available at* <http://pelosi.house.gov/news/press-releases/2011/03/pelosi-letter-to-speaker-boehner-on-house-counsel-defense-of-doma.shtml>.

138. A final practical point relates to the possibility that there will be a multiplicity of lawsuits filed in which Congress would have to take up the defense. For example, each service member discharged under Don't Ask, Don't Tell, even if now eligible for reinstatement, might be able to bring suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. §§ 1346, 1491 (2006), and the Military Pay Act, 37 U.S.C. § 204 (2006), seeking back pay in connection with a separation alleged to be unconstitutional. *See, e.g.,* *Holley v. United States*, 124 F.3d 1462, 1465–66 (Fed. Cir. 1997); *Filipczyk v. United States*, 88 Fed. Cl. 776, 779 (2009); *Loomis v. United States*, 68 Fed. Cl. 503, 505 (2005); *Clifford v. United States*, 59 Fed. Cl. 440, 441 (2004); *Golding v. United States*, 48 Fed. Cl. 697, 700–01 (2001); *Milas v. United States*, 42 Fed. Cl. 704, 706, 710 (1999). In addition, the Court of Federal Claims recently ruled that it had jurisdiction to entertain claims by service members who were honorably discharged but whose separation pay was reduced from 100 percent to 50 percent because of their homosexuality. *See Collins v. United States*, No. 10-778C, 2011 WL 4937336 (Fed. Cl. Oct. 18, 2011). There is a six-year limitations period on actions in the Court of Federal Claims. *See* 28 U.S.C. § 2501 (2006); *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2004). As a rough indicator of the order of magnitude of possible claims, more than 3000 individuals were apparently discharged under Don't Ask, Don't Tell in the six years from 2005 to 2010. *See Don't Ask, Don't Tell*, WIKIPEDIA, http://en.wikipedia.org/wiki/Don't_ask,_don't_tell#Discharges (last visited Feb. 14, 2012).

As for DOMA, any litigant claiming a denial of benefits must point to a substantive law creating a right to monetary relief. One obvious right of action is under the tax laws, and same-sex couples whose marriages are denied federal recognition may be disadvantaged under the estate tax or in some circumstances—withstanding the notoriety of the so-called marriage penalty—under the income tax. *See, e.g., Windsor*, 797 F. Supp. 2d 320 (S.D.N.Y. 2011) (estate tax); *Pedersen v. OPM*, 2011 WL 176764 (D. Conn. 2011) (income tax). The question whether a same-sex, married couple may file a joint petition for bankruptcy has also arisen in bankruptcy proceedings. *See, e.g., In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal 2011); *In re Somers*, 448 B.R. 677 (Bankr. S.D.N.Y. 2011).

In all such litigation, the executive would presumably concede the unconstitutionality of DOMA but might contest other issues, such as damages or whether the limitations period

congressional pinch-hitting will often not be a full substitute for defense by the executive.

B. Institutional Continuity: Relationships Within the Department of Justice and Between the Department and Other Government Actors

A second point bearing on the decision whether to defend—one implicated by both Don't Ask, Don't Tell and DOMA—concerns institutional continuity. Each statute was signed into law by President Clinton after his Department of Justice concluded that it was constitutional.¹³⁹ Both President Clinton's and President George W. Bush's Departments of Justice defended the laws in court, generally with success, and President Obama's administration initially continued the executive branch's policy of defense.¹⁴⁰ A decision to

had expired. Lawyers representing Congress could theoretically appear—at least as amicus—in all cases on the constitutional issues. Congressional legal offices, however, lack the staff to handle a large volume of litigation, and although Congress has authorized the hiring of private lawyers, *see, e.g.*, 2 U.S.C. § 288 (2006), defending the government in large numbers of cases is not a traditional function of legislative-counsel offices. For example, in *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011), Congress obtained a short continuance to determine whether to intervene, but failed thereafter to file papers before the constitutional issue was decided, and in *In re Somers*, 448 B.R. 677 (Bankr. S.D.N.Y. 2011), Congress apparently made no effort to appear.

Plainly, requiring two sets of lawyers for the government in multiple cases is hardly an ideal arrangement.

139. As to DOMA, see Letter from Andrew Fois, Assistant Attorney Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to Representative Henry J. Hyde, Chairman, Comm. on the Judiciary, U.S. House of Representatives (May 14, 1996), reprinted in *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. app. at 243 (1996). As to Don't Ask, Don't Tell, see generally Memorandum from Janet Reno, Attorney Gen. of the U.S., to President William J. Clinton, Defensibility of the New Policy on Homosexual Conduct in the Armed Forces (July 19, 1993), available at <http://dont.stanford.edu/regulations/RenoMemo.htm>.

140. Don't Ask, Don't Tell was upheld in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008); *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); and *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996). See also *Loomis v. United States*, 68 Fed. Cl. 503 (2005) (upholding a similar Army regulation). The decisions in *Cook* and *Loomis v. United States*, 68 Fed. Cl. 503 (2005), postdated the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

In *Witt v. Department of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008), the court held that the policy was subject to heightened scrutiny; on remand for a trial under that standard, the district court ruled that the policy was unconstitutional as applied, *Witt v. U.S. Dep't of the Air Force*, 739 F. Supp. 2d 1308, 1316 (W.D. Wash. 2010). A different district court held the policy unconstitutional in *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 927 (C.D. Cal. 2010), vacated as moot, 658 F.3d 1162 (9th Cir. 2011).

reverse course will inevitably lead to a charge that the incumbent administration is picking and choosing whether to defend statutes based on its policy preferences.

Against that background, Attorney General Eric Holder, in his letter notifying Congress of the administration's refusal to continue to defend DOMA, faced a burden of explanation for the Justice Department's shift in policy. The letter stated that some "professionally responsible arguments" in defense of the statute were not reasonable,¹⁴¹ without offering any explanation of when that was so. One can imagine instances in which the claim seems correct. For example, the Department of Justice, as an institutional litigant, might hesitate frequently to advance "professionally responsible arguments" that a prior Supreme Court decision, under which a statute would be unconstitutional, should be overruled, for fear of undercutting its standing with the Supreme Court. That prudential concern might support a conclusion that it is not reasonable, in a particular setting, to present such an argument without implying that the argument fell outside the bounds of professional conduct. But

DOMA was upheld in *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); and *In re Kandu*, 315 B.R. 123, 138 (Bankr. D. Wash. 2004).

More recently, one district judge found DOMA to be an unconstitutional denial of equal protection, *see Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010). In a companion case, *Massachusetts v. U.S. Department of Health & Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010), the same judge reached the more dubious conclusion that DOMA also violates the Tenth Amendment, *id.* at 253. A second judge strongly suggested that the statute is unconstitutional. *See Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178 (N.D. Cal. 2011) (rejecting a motion to dismiss for failure to state a claim); *see also In re Levenson*, 587 F.3d 926, 931 (9th Cir. 2009) (reviewing, in a nonjudicial administrative capacity, an internal discrimination complaint by an employee of the judicial branch and determining that DOMA is unconstitutional); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (invalidating California's ballot proposition purporting to prohibit same-sex marriage), *aff'd*, *Perry v. Brown*, Nos. 10-16696 & 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012). After this Lecture was delivered, the Bankruptcy Court of the Central District of California also held the statute unconstitutional. *In re Balas*, 449 B.R. at 569.

141. Letter of Eric H. Holder, Jr., to Representative John A. Boehner, *supra* note 9, at 5. Cases may exist in which the position taken by a set of Justice Department lawyers in the district court, upon fuller review by higher officials in the Department, is determined to be unconvincing. *See, e.g., Waxman, supra* note 79, at 1080. But that would not seem to be a likely account of the change in position with regard to DOMA, given that numerous lawsuits were pending, the issue plainly was politically salient, and just six weeks before the attorney general's announcement the government had filed a brief—presumably authorized by the solicitor general—in the First Circuit seeking to overturn the first district court decision striking down DOMA. *See Corrected Brief for the United States Department of Health and Human Services, et al.* at 24–58, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10-2204, 10-2207 & 10-2214 (1st Cir. Jan. 19, 2011).

needless to say, that concern was not presented by DOMA. And the letter failed to explain why advancing plausible arguments for DOMA's validity was unreasonable.

As to the shift in the administration's stance, the letter noted that past challenges to DOMA arose in circuits—for example, the First Circuit—whose precedents called for rational basis review of classifications based on sexual orientation.¹⁴² Two new lawsuits, however, had been filed within the Second Circuit, which lacked precedents on the standard of review.¹⁴³ The administration was thus required, the letter continued, to identify the appropriate standard of review, which the department deemed to be heightened scrutiny—a standard under which the statute must fall.¹⁴⁴

The new lawsuits did present a thorny problem. For an administration unsympathetic to DOMA but engaged in defending its constitutionality, writing a brief stating that circuit precedent rejects heightened scrutiny¹⁴⁵ is far easier than arguing against such scrutiny as a matter of first impression. But the proffered explanation for the shift in the executive's position—that new lawsuits had been filed—is not convincing.

The attorney general's letter suggested that although the executive branch could fairly argue in the First Circuit that the rational basis test governed, it could not make that argument in the Second Circuit. To evaluate that reasoning, one must inquire what it means to have a plausible argument for a statute's constitutionality. On one view, the mere fact that a precedent exists—that the First Circuit had applied the rational basis test to classifications based on sexual orientation—supplies a plausible argument, at least within that circuit. But a different, and I believe correct, view requires more; although a court's reasoning deserves the most careful consideration, any particular judge or panel of judges may take a position that cannot be deemed plausible—either because of intervening developments or simply because it was dead wrong from the outset. Thus, the fact that a decision was rendered does not by itself establish that the legal position articulated meets any particular standard, however phrased, of legal correctness, acceptability, or plausibility. Much as a decision of a state court that rejects a constitutional claim

142. Letter of Eric H. Holder, Jr., to Representative John A. Boehner, *supra* note 9, at 1–2.

143. *Id.* at 1.

144. *Id.* at 2.

145. *See Cook v. Gates*, 528 F.3d 42, 60–62 (1st Cir. 2008).

is not deemed to be reasonable on federal habeas corpus review simply because the decision was rendered,¹⁴⁶ so too a decision of a lower federal court upholding a statute or specifying a standard of review is not *ipso facto* plausible.

Nor is a decision of one circuit an exercise of sovereignty over a particular region. Rather, it is an expression of what one regionally confined tribunal believes national law to be.¹⁴⁷ Accordingly, the executive branch could properly rely on a First Circuit decision not only within that circuit, but also in new lawsuits filed within the Second Circuit—where, after all, the First Circuit’s decision remains a precedent, if not a controlling one. And, in any event, the attorney general’s letter ultimately backed away from a circuit-by-circuit approach, stating that the administration would no longer rely, even within the First Circuit, on a precedent calling for rational basis review—apparently on the ground that such a precedent was unreasonable.¹⁴⁸ What was not convincingly explained was why the administration once considered that precedent to be reasonable but

146. See *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

147. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 726 (1989).

In making this claim, I wish to account for the Supreme Court’s very interesting decision, handed down two months after this Lecture, in *Camreta v. Greene*, 131 S. Ct. 2020 (2011). There, the Court stated that one court of appeals’ decision clearly establishes the law prospectively within that circuit, for purposes of assessing in future cases whether an official is entitled to qualified immunity from damages in a constitutional-tort action under 42 U.S.C. § 1983 (2006). *Camreta*, 131 S. Ct. at 2032. Under *Camreta*, the availability of qualified immunity for the very same conduct could differ from one circuit to another, based on the state of circuit precedent.

Accepting that outcome does not derogate from the point in text. A court could take the view that there are functional reasons why officials should be required to be familiar with only a limited body of law, such as, for example, decisions of the Supreme Court and of their state supreme court or regional federal court of appeals. Immunity is a remedial doctrine that may appropriately have a heavy functional component. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1764–97, 1820–24 (1991). The Department of Justice has no corresponding functional reason to treat the merits of suits to enjoin a federal statute of nationwide applicability differently in different federal circuits—at least in cases, such as DOMA, in which no circuit court precedent so requires. And indeed, just a few days after the *Camreta* decision, in *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011), Justice Kennedy, who had dissented in *Camreta*, suggested that the Court’s approach in that case would not necessarily apply in the same way to a federal official with nationwide responsibilities, *id.* at 2086–87 (Kennedy, J., concurring).

148. See Letter of Eric H. Holder, Jr., to Representative John A. Boehner, *supra* note 9, at 5 (“[T]he Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a ‘reasonable’ one.”).

no longer did so. The mere filing of two additional lawsuits would not seem to change the relevant legal terrain.

But put aside the question of consistency. Suppose the administration, immediately upon taking office, had refused to defend DOMA. Professor Walter Dellinger argues that no administration should have to ask a court to accept propositions that the president believes are fundamentally wrong.¹⁴⁹ Hence, the argument goes, the administration would be justified in refusing to write a brief—as it would have had to do to vigorously defend the statute—contending that distinctions based on sexual orientation are not subject to heightened scrutiny, or that DOMA does not rest on animus against gay and lesbian individuals.¹⁵⁰

Professor Dellinger's position has an obvious appeal; it does grate to have to say that a policy one believes to be offensive, deeply misguided, and probably unconstitutional should be upheld. Yet his position does not just threaten to cut deeply into any conception of a duty to defend; at some level, it is inconsistent with the idea that the defense of acts of Congress by the executive is a duty. Recall the examples noted earlier of two statutes that the Justice Department defended, even though the president who signed each into law, and who continued in office as constitutional challenges were being litigated, had publicly declared that he thought each was, or very likely was, unconstitutional.¹⁵¹ Just as the First Amendment truly counts not when protecting ideas that we agree with, but, in Justice Holmes's famous phrase, when protecting "freedom for the thought that we hate,"¹⁵² so too the duty to defend counts when the executive branch defends acts of Congress that it views as offensive, of questionable constitutionality, or both. One hardly needs to invoke a *duty* to defend statutes that one applauds.

Departing from that duty carries many costs, some subtler than others. Friction might arise between the Justice Department's leadership and career lawyers who traditionally defend statutes whatever their personal views of the statutes' constitutionality; the career lawyers might even start to wonder if *they* must agree with the positions taken in defense of the United States. Meanwhile, the

149. Walter Dellinger, *The DOMA Decision*, NEW REPUBLIC (Mar. 1, 2011, 12:00 AM), <http://www.tnr.com/article/politics/84353/gay-marriage-obama-gingrich-doma>.

150. *Id.*

151. *See supra* text accompanying notes 111–17.

152. *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929).

considerable credibility that the Department has with the courts, because of the consistency with which it fulfills its responsibilities, might be undermined if some judges view an administration's failure to defend a statute—especially one that was successfully defended by prior administrations—as evidence of politicization.

Any failure to defend might raise distinct problems within the relevant executive department. Here, Don't Ask, Don't Tell provides a useful illustration. Executive departments do not necessarily fall into line with presidential wishes,¹⁵³ and President Obama's call to repeal Don't Ask, Don't Tell did not gain immediate support in 2009 from the Pentagon.¹⁵⁴ Continuing to defend the statute in court, while working with Pentagon leadership to gather support for repeal, was critical to securing swing votes from members of Congress who were wary of voting to repeal if the military was not on board. Appearing to short-circuit the repeal process by playing a constitutional trump card could have undermined support for repeal in both the Pentagon and Congress. With the prospect of judicial invalidation uncertain, such a course would have risked leaving the discriminatory legislation in place for far longer.¹⁵⁵

Quite apart from its effect on repeal, a refusal to defend might bring a reaction from Congress that a president could rarely afford to ignore. In confirmation hearings, Justice Department nominees are regularly asked whether they will defend statutes. For example, in the hearing on her nomination to serve as President Obama's Solicitor General, now-Justice Kagan pledged that she would continue the

153. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272 (2001); M. Elizabeth Magill, *The First Word*, 16 WM. & MARY BILL RTS. J. 27, 30 (2007).

154. Early in the Obama administration, Secretary of Defense Robert Gates and Chairman of the Joint Chiefs of Staff Admiral Michael Mullen were very publicly guarded in addressing Don't Ask, Don't Tell. Secretary Gates said, "If we do it, . . . it's important that we do it right, and very carefully." Elisabeth Bumiller, *Gates Cautious on Repeal of Ban on Gays in Military*, N.Y. TIMES THE CAUCUS BLOG (Apr. 16, 2009, 6:23 PM), <http://thecaucus.blogs.nytimes.com/2009/04/16/gates-cautious-on-repeal-of-ban-on-gays-in-military> (quoting Sec'y Gates) (internal quotation marks omitted). Admiral Mullen stated, "I would need some time for a force that's under a great deal of stress—we're in our sixth year of fighting two wars—to look at if this change occurs, to look at implementing it in a very deliberate, measured way." *This Week with George Stephanopoulos* (ABC television broadcast May 24, 2009) (quoting Admiral Mullen) (transcript available at <http://abcnews.go.com/ThisWeek/story?id=7664072>).

155. The point is not that enforcing and defending discriminatory statutes is always the best way to secure their repeal. The political calculus in each case will differ. Indeed, in the case of the HIV provision noted previously, see *supra* text accompanying notes 71–74, the announced refusal to defend resulted in repeal of the statutory provision before the time at which the executive would otherwise have been obliged to act.

tradition of defending all acts of Congress, except when they impinged upon executive authority or when no reasonable argument for their validity existed.¹⁵⁶ Attorney General Holder made a similar, if somewhat less sharply defined, promise.¹⁵⁷ Such pledges have commonly been made by Justice Department officials in past administrations.¹⁵⁸ Against that background, a refusal to defend can undermine the credibility in Congress of key Justice Department officials,¹⁵⁹ who may feel committed to adhere to these pledges as a

156. See *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee To Be Associate Attorney General of the United States and Elena Kagan Nominee To Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 47 (2009) (statement of Elena Kagan) (“Traditionally, outside of a very narrow band of cases involving the separation of powers, the Solicitor General has defended any Federal statute in support of which any reasonable argument can be made.”). The future solicitor general’s view could be viewed as having an unspecified qualification, as she spoke of a presumption of defense, without indicating when that presumption might be overcome, but the tenor of the exchange suggests at the very least that there is a strong presumption in favor of defense. See *id.* (“And I pledge to continue this strong presumption that the Solicitor General’s Office will defend each and every statute enacted by this body.”).

157. Holder explained, “Well, that is now contained in a statute. The duty of the Justice Department is to defend statutes that have been passed by Congress, unless there is some very compelling reason not to.” *Nomination of Eric H. Holder, Jr., Nominee To Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 112 (2009) (statement of Holder) (referring to civil-liability protections under the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 18 and 50 U.S.C.)). Holder continued, “The Justice Department has as a matter of policy the obligation to defend Federal statutes [*sic*]. I can’t think of a statute that my Department of Justice, should I be confirmed, would be more proud to stand behind.” *Id.* at 156 (referring to the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.)).

158. See, e.g., *Confirmation Hearing on the Nominations of Larry D. Thompson To Be Deputy Attorney General and Theodore B. Olson To Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 132 (2001) (statement of Theodore B. Olson); *Confirmation Hearing on the Nomination of John Ashcroft To Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 141 (2001) (statement of John Ashcroft); see also Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 224 n.215 (1999); Dawn E. Johnsen, *What’s a President To Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 410 (2008).

159. In the case of DOMA, then-Solicitor General Kagan had joined the Supreme Court months before the decision not to defend was made, and her eventual successor, Donald Verrilli, had been nominated but had not yet received a hearing on that nomination. Although Verrilli, who worked in the Obama Justice Department and White House, had been recused from working on DOMA, he nonetheless faced a barrage of critical questions during his confirmation hearing related to the administration’s decision to cease its defense of DOMA. *Justice Department Nominations: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011), available at <http://www.senate.gov/fplayers/CommPlayer/commFlashPlayer.cfm?fn=judiciary033011p&st=xxx>.

matter not only of congressional expectation but also of personal honor.¹⁶⁰

Given congressional expectations, when the administration fails to present a colorable defense to a statute, broader legislative responses may be forthcoming. One could easily imagine oversight hearings—especially when one house is controlled by a party other than that of the president—attacking the Justice Department for not performing its duty; senators may threaten to hold up the confirmation of nominees to the Department of Justice or, indeed, for any executive post, in retaliation for the failure to defend the interests of Congress. With respect to the decision not to defend DOMA, such reactions quickly materialized.¹⁶¹ More broadly, whether such reactions occur; whether, when they do, they are more than pretexts for efforts to criticize or oppose the executive branch; and whether they cause serious difficulties all depend on the politics of the moment. But there is a clear potential for a regrettable increase in interbranch friction.¹⁶²

I acknowledge that, to a certain extent, the concerns I have raised derive from a premise that executive officials, members of Congress, and federal judges are not departmentalists and that they reject a robust view of executive constitutionalism—at least in the context of defending acts of Congress.¹⁶³ One might object that if, as a

160. See, e.g., *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 106 (“I had sworn to defend capital punishment in my confirmation hearings, and I certainly was not going to go back on that.” (statement of former Solicitor General Drew S. Days III)).

161. For criticism of the attorney general during an appropriations hearing less than a week after the DOMA decision, see *The FY 12 Department of Justice Budget: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the S. Comm. on Appropriations*, 112th Cong. 73:30–77:55 (2011), available at <http://appropriations.senate.gov/webcasts.cfm?method=webcasts.view&id=09fe9fcf-221b-42ed-a363-64fa49c53ac9>. Republicans added the DOMA decision to a list of reasons why they might oppose the confirmation of Deputy Attorney General James Cole. See David Ingram, *Republicans Launch New Attacks on Deputy AG*, THE BLT: THE BLOG OF LEGAL TIMES (Mar. 17, 2011, 12:13 PM), <http://legaltimes.typepad.com/blt/2011/03/republicans-launch-new-attacks-on-deputy-ag-james-cole.html>. After this Lecture was delivered, Mr. Cole was finally confirmed in June 2011, more than a year after his nomination. For repeated criticism voiced during the hearing on the nomination of Verrilli to be solicitor general, see *Justice Department Nominations*, *supra* note 159.

162. See Strauss, *supra* note 34, at 125.

163. See, e.g., *Justice Department Nominations*, *supra* note 159 (statement by Sen. Orrin G. Hatch); *Constitutionality of GAO’s Bid Protest Function: Hearings Before a Subcomm. on the H. Comm. on Gov’t Operations*, 99th Cong. 2 (1985) (statement of Rep. Jack Brooks, Chairman, H. Comm. on Gov’t Operations); *Representation of Congress and Congressional Interests in Court*, *supra* note 48, at 1, 8–9 (statement of Rex E. Lee, Assistant Attorney Gen., Civil Div., U.S.

matter of first principles, departmentalism is the correct approach, these concerns are beside the point. But I think it is a fact—perhaps a contingent fact, perhaps on some views a historically or normatively unjustified fact, but a fact nonetheless—that a court-centric understanding of constitutional interpretation is deeply entrenched in both government officials and the public.¹⁶⁴ More important, that understanding is most deeply ingrained with regard to defense of statutes (as well as compliance with court orders). None of this means that a refusal to defend is normatively illegitimate. It does mean that the wisdom of such a decision must account for the institutional and attitudinal context in which it is taken.

C. *The Claims of Executive Superiority in Constitutional Interpretation*

There remains a narrower argument that might support a refusal to defend, or even to enforce, Don't Ask, Don't Tell in particular. In defending the Clinton administration's refusal to defend the statute requiring discharge of HIV-positive service members, Professors Dawn Johnsen and David Barron both argue that the executive was better able to determine the constitutional meaning of equal protection in that context than the courts or Congress.¹⁶⁵ They view the rational basis test, because it is rooted in the judiciary's limited capacity to assess government interests,¹⁶⁶ as underenforcing constitutional norms. As a result, the political branches, which can assess such interests expertly and nondeferentially, may find wanting what courts would validate.¹⁶⁷ The executive's constitutional judgment, the argument continues, was also superior to that of

Dep't of Justice); Letter from Benjamin Civiletti, Attorney Gen. of the U.S., to Senator Max Baucus (July 30, 1980), reprinted in *Department of Justice Authorization and Oversight, 1981: Hearings Before the S. Comm. on the Judiciary*, 96th Cong. 871 (1980).

164. See, e.g., Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 6–7 (2001); Whittington, *supra* note 14, at 776–77.

165. See Barron, *supra* note 58, at 80. For a discussion of underenforcement and gaps between constitutional doctrine and constitutional meaning, see, for example, RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 3, 37–38, 45–46, 111 (2001); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1264 (1988).

166. See Barron, *supra* note 58, at 79; see also Johnsen, *supra* note 43, at 42 (“The courts typically sacrifice some measure of their own best view of whether a statute is constitutional and apply a general presumption of constitutionality and the extremely deferential rational basis standard of review.”).

167. See Barron, *supra* note 58, at 77; Johnsen, *supra* note 18, at 115.

Congress—whether because Congress had not carefully considered the rationality of the HIV ban¹⁶⁸ or because the president, as commander-in-chief, has a distinctive authority and capacity to evaluate the ban's effect on the military.¹⁶⁹ Thus, even assuming that the courts would uphold the measure, the executive could appropriately determine that it was unconstitutional.¹⁷⁰

A claim of comparative constitutional expertise does not fit DOMA well. No constitutional provision specifically recognizes the executive's authority over employee benefits, and it is not obvious why the executive has greater expertise about that matter than Congress. Moreover, Attorney General Holder's explanation hinged not on a claim of distinctive executive competence or an assessment of the strength of government interests but rather on his interpretation of judicial doctrine pertaining to heightened scrutiny.¹⁷¹

Even as to Don't Ask, Don't Tell, the claim of executive superiority is a bit muddled. Unlike the HIV ban, the Don't Ask, Don't Tell rule was determined to be constitutional by both political branches when it was enacted.¹⁷² Moreover, although by the end of 2010, repeal had the support of a Pentagon study and the civilian and military leadership of the Defense Department,¹⁷³ a significant minority of service members opposed repeal,¹⁷⁴ and the army chief of

168. See Johnsen, *supra* note 43, at 57.

169. See Barron, *supra* note 58, at 95.

170. See Strauss, *supra* note 34, at 128–29.

171. See Letter from Eric H. Holder, Jr., to Representative John A. Boehner, *supra* note 9, at 2–5.

172. See *supra* notes 32, 139.

173. See *The Report of the Department of Defense Working Group That Conducted a Comprehensive Review of the Issues Associated with a Repeal of Section 654 of Title 10, U.S.C., "Policy Concerning Homosexuality in the Armed Forces": Hearings Before the S. Comm. on Armed Servs.*, 111th Cong. 6 (2010) (statement of Robert M. Gates, U.S. Sec'y of Def.); *id.* at 9 (statement of Admiral Michael G. Mullen, Chairman, Joint Chiefs of Staff).

174. For example, the Defense Department report survey data showed that although only 21.2 percent of service members overall believed that unit readiness would be negatively impacted by the repeal of Don't Ask, Don't Tell, certain groups were more likely to perceive a negative impact, such as Army "combat arms," 35.1 percent of whom thought readiness would be hurt. U.S. DEP'T OF DEFENSE, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" 68 tbl.7, 74 tbl.15 (2010), available at http://www.defense.gov/home/features/2010/0610_dadt/DADTRReport_FINAL_20101130%28secure-hires%29.pdf. Even within branches of the service, division existed. Whereas 31.8 percent of Marines thought repeal would have a negative impact, that number climbed to 43.5 percent when limited to Marine Corps "combat arms" alone. *Id.* at 74 tbl.15.

staff¹⁷⁵ and the commandant of the Marines¹⁷⁶ both publicly opposed repeal, at least at that time. Those minority voices do not make executive policy, but their existence makes it harder to claim that Congress could not have concluded that there was a rational basis for the statute.

There remains the further question whether the executive's interpretive capacity is superior to that of Congress with respect to military service by gay and lesbian individuals. The commander-in-chief and the civilian and military leadership at the Pentagon clearly have relevant authority and expertise. But Congress also had long experience with the issue and, under Article I, possesses the constitutional authority to regulate armies and navies.¹⁷⁷ In a not dissimilar context—when reviewing the statute requiring men but not women to register with the selective-service system—the Supreme Court downplayed the executive branch's support for including women as a matter of equity and stressed instead that the grant of constitutional authority to regulate the land and naval forces is to Congress and not to the executive.¹⁷⁸ Some may be unpersuaded by the Court's argument, but it shows that comparative institutional advantage itself may be highly contestable.

Moreover, insofar as an executive decision rests on a claim of institutional superiority, the logical response would seem to be not to enforce the statute at all, rather than to enforce it but then to refuse to defend it in court. Indeed, a refusal to enforce has the attraction of eliminating delay in the provision of benefits to those who the administration has concluded are the victims of unconstitutional discrimination. It also sidesteps the temptation to take what could be viewed as a half-measure—refusing to defend and securing whatever moral or political advantage might accrue from that refusal without really biting the bullet. To be sure, many view a failure to enforce a statute as a more radical step, as it could deny the courts the

175. See *The Report of the Department of Defense Working Group*, *supra* note 173, at 86 (statement of Gen. George W. Casey, Jr., Chief of Staff of the Army) (“Implementation of the repeal of DADT would be a major cultural and policy change in the middle of a war. . . . It would be implemented by a force in which a substantial number of soldiers perceive that repeal will have a negative impact on unit effectiveness, cohesion, and morale, and that implementation will be difficult.”).

176. See *id.* at 91 (statement of Gen. James F. Amos, Commandant of the Marine Corps) (“[M]y recommendation is that we should not implement repeal at this time.”).

177. U.S. CONST. art. I, § 8, cls. 12–13.

178. *Rostker v. Goldberg*, 453 U.S. 57, 80 n.15 (1981).

opportunity to provide an authoritative judicial resolution of the constitutional issue.¹⁷⁹ But insofar as an independent constitutional determination by the executive is premised on its superior interpretive capacity, it is puzzling why the executive should strive to ensure that ultimate interpretive authority is retained in the (institutionally inferior) courts.

D. The Risk of Lackluster Defense and the Scope of the Duty To Defend

Although I have sought to highlight the importance of maintaining the traditional duty to defend, those who believe not merely that Don't Ask, Don't Tell and DOMA should be defended but also that they are in fact constitutional might be wary about defense of those statutes by the Obama administration. Suppose that President Obama and Attorney General Holder held the constitutional views set forth in the attorney general's letter, but did not direct the Department of Justice to cease defending DOMA. Professor Peter Strauss expresses doubt about whether the executive branch would defend a statute with adequate vigor if it harbored strong doubts about the statute's constitutionality; indeed, he goes so far as to contend that if the president has concluded that a statute is unconstitutional, to take the opposite position in litigation would risk creating a friendly suit.¹⁸⁰

Although any generalization in this regard is hazardous, I believe that Professor Strauss's assessment greatly exaggerates the risks. In

179. See *Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 127 (1996) ("While the Supreme Court's decisions interpreting the Constitution cannot simply be equated with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution."); see also Johnsen, *supra* note 43, at 41 ("[P]residential non-enforcement decisions should reflect deference to Supreme Court precedent [O]n the whole, courts are better suited to the business of constitutional interpretation" (footnote omitted)); Pillard, *supra* note 60, at 734-36 ("According to [*Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124], a substantively court-centered approach to executive constitutionalism applies, not only where there is settled Court precedent on point, but even where the Court's existing doctrine is not determinative of the constitutional question.").

Moreover, although a decision to refuse to enforce DOMA or Don't Ask, Don't Tell when the statutes were enacted might have precluded the courts from opining, that is not true if one administration's decision not to enforce follows enforcement by earlier administrations. Often individuals harmed by these statutes in the past can sue for monetary relief, see *supra* note 105, which provides an opportunity for courts to decide the constitutional issues.

180. See Peter L. Strauss, *The President and Choices Not To Enforce*, 63 LAW & CONTEMP. PROBS. 107, 119-20 (2000).

my time in the executive branch, career litigators, and the political appointees in the Department of Justice who were overseeing them, were energetic and effective in defending Don't Ask, Don't Tell, DOMA, and many other statutes, notwithstanding obvious questions about the constitutionality of these statutes. And although I did not witness the defense of statutes after a presidential determination of unconstitutionality, that was the situation in *Oregon v. Mitchell*,¹⁸¹ in which the Justice Department's defense of the challenged Act was partially successful.¹⁸² Similarly, in *McConnell v. FEC*,¹⁸³ even after the president expressed serious constitutional doubts about the statute's constitutionality, the Department's defense was nearly entirely successful.¹⁸⁴ Given the traditions of the career lawyers in the Department, I doubt that their vigor would flag in the face of such a presidential determination.

But such accusations have been made about the Obama administration's briefs in defense of DOMA during the period before the decision was made to cease defending the Act.¹⁸⁵ In its briefs, the Department of Justice disavowed two of the interests that the congressional record suggested that DOMA supported: promoting effective child-rearing and encouraging procreation.¹⁸⁶ The briefs noted that many leading medical, psychological, and social-welfare organizations had concluded, "based on numerous studies, that

181. See *supra* text accompanying notes 111–13.

182. See *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970) (holding that "Congress can fix the age of voters in national elections, such as congressional, senatorial, vice presidential and presidential elections, but cannot set the voting age in state and local elections").

183. *McConnell v. FEC*, 540 U.S. 93 (2003); see *supra* text accompanying notes 116–17.

184. See *McConnell*, 540 U.S. at 188–246 (invalidating two provisions of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.), but rejecting or dismissing constitutional challenges to a large number of others).

185. See, e.g., Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 970 (2010) ("[I]t would be inaccurate to say the Obama administration's Justice Department presented a high quality or serious defense like previous administrations had given when defending DOMA in earlier cases."); Ed Whelan, *Obama's Dive on DOMA*, NAT'L REV. ONLINE BENCH MEMOS BLOG (Feb. 23, 2011, 2:53 PM), <http://www.nationalreview.com/bench-memos/260523/Obama-s-dive-doma-ed-whelan> ("[T]he Obama administration has been sabotaging DOMA litigation from the outset. Today's action [ordering the Department of Justice to stop defending DOMA] at least has the modest virtue of bringing that sabotage out into the open.").

186. See, e.g., Memorandum of Law in Support of Defendants' Motion To Dismiss at 19 n.10, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 09-10309-JLT), 2009 WL 5803678 ("In this case, the government does not rely on certain purported interests set forth on the legislative history of DOMA . . .").

children raised by gay and lesbian parents are as likely to be well adjusted as children raised by heterosexual parents”¹⁸⁷ and that encouraging procreation was not a rational basis for limiting marriage to opposite-sex couples, given that, as Justice Scalia noted in dissent in *Lawrence v. Texas*,¹⁸⁸ “the sterile and the elderly are allowed to marry.”¹⁸⁹ The Department of Justice then articulated the main interest advanced by DOMA this way: in 1996, when same-sex marriage was nowhere recognized in the United States, Congress could legitimately maintain the status quo, providing benefits only to a form of marriage whose legitimacy was universally recognized, and could thereby ensure federal uniformity, pending further evolution in the states.¹⁹⁰

That shift in briefing strategy led to accusations that the Department’s defense of the statute was halfhearted.¹⁹¹ One commentator remarks that the later decision not to defend DOMA brought the administration’s sabotage of the statute out into the open.¹⁹² That assessment, if correct, would surely lend support to Professor Strauss’s concern. But I do not share that assessment. Given the dramatic change in public attitudes about gays and lesbians since DOMA was enacted,¹⁹³ rationales that might have seemed forceful or at least rational in 1996 looked quite different in 2009. In my judgment, though colorable arguments for DOMA could certainly have been advanced, none of the asserted government interests—neither those in the legislative record nor the one articulated by the Justice Department in 2009—were particularly robust. The 2009 formulation has a bit of a tautological quality. Nonetheless, it was less vulnerable to being undermined as illogical, contrary to social-science evidence, or as evidencing impermissible animus than were the interests articulated in the legislative record in promoting

187. *Id.*

188. *Lawrence v. Texas*, 539 U.S. 558 (2003).

189. *Id.* at 605 (Scalia, J., dissenting).

190. See Memorandum of Law in Support of Defendants’ Motion To Dismiss, *supra* note 186, at 17–18, 2009 WL 5803678.

191. See, e.g., Wardle, *supra* note 185, at 970.

192. See Whelan, *supra* note 185.

193. See *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Feb. 14, 2012) (reporting polling data suggesting that between 1996 and 2011, the percentage of Americans who believe homosexual relations between consenting adults should be legal rose from 44 to 64 percent, while the percentage opposed declined from 47 to 32 percent).

procreation, encouraging heterosexual marriage, and expressing moral disapproval.¹⁹⁴

Of course, not all lawyers would necessarily have followed the new briefing strategy; government lawyers in the George W. Bush administration did not disavow the interests set forth in the legislative record. There is ample room for debate about the best way to craft an effective defense of a statute that presents obvious constitutional vulnerabilities. But given the plausibility, and I would suggest, the lesser vulnerability of the 2009 formulation, I do not see the change in briefing strategy as providing support for Professor Stauss's position or, more broadly, for suggesting that entrusting the defense of a statute to officials in an administration that might harbor widespread doubts about the statute's constitutionality is perilous.

A related but distinct question would reach beyond judgments about litigation tactics. One might take the view that a proper conception of the duty to defend requires the executive to advance all the government interests that Congress declared that the statute served, even if no one thought that strategy to be the most likely way to prevail. That view, however, seems implausible. Litigators routinely choose among arguments and jettison some that, even though permitted by Rule 11 of the Federal Rules of Civil Procedure,¹⁹⁵ they believe lack force or might undermine credibility. Unlike in private litigation, it is not feasible for the executive to consult a client (Congress?) to ascertain its wishes. But as in private litigation, it seems fair to assume that ordinarily the client's chief objective is to prevail. Thus, I believe that the executive is more faithful in its responsibilities to Congress when it reshapes arguments in an effort to prevail than when it parrots the legislative record if doing so would seem to increase the risk of defeat. That is exactly, I believe, what the Obama administration's Department of Justice did during the period in which it was defending DOMA.

IV. INDIVIDUAL DECISIONS AND GENERAL PRACTICES

The question whether the president should defend or enforce a statute like Don't Ask, Don't Tell or DOMA is a complex one, and not everyone will be persuaded by my discussion either of particular

194. A fourth interest articulated by Congress—preserving governmental resources—though not of overwhelming force by itself, continued to be relevant to the statute as defended by the Obama administration.

195. FED. R. CIV. P. 11.

decisions or of any theory that might underpin such decisions. But I want to move the discussion to a higher level of generality, for I believe the most critical question is the attractiveness of a *regime* in which each administration views itself as having significant latitude to refuse to enforce and defend acts of Congress. And I think such a regime is likely to be less attractive than particular decisions or theories, for a very simple but important reason: different administrations are likely to have sharply different views about the appropriate occasions for, and the appropriate theories underlying, such decisions.

At the level of individual decisions, I heard it said that if the George H.W. Bush administration would not defend what it viewed as invidious reverse discrimination in *Metro Broadcasting*, the Obama administration need not defend what it believes to be invidious discrimination against gays. And one can well imagine that the failure to defend DOMA could in turn be invoked as a reason for a future Republican administration to refuse to defend some other statute in the years ahead.

What is true of particular decisions is also true of particular theories. Although not impossible, it seems unlikely that theories like those of Professors Barron and Johnsen, premised in part on a conception of underenforcement of individual constitutional rights, especially the right to equal protection,¹⁹⁶ would commend themselves to a Republican administration.¹⁹⁷ By the same token, such an administration might find itself more attracted to an entirely different view. Recall, for example, that the Reagan Department of Justice published a report declaring that “government attorneys should advance constitutional arguments based only on [the Constitution’s] ‘original meaning’”;¹⁹⁸ that *Griswold*,¹⁹⁹ *Roe*,²⁰⁰ and *Miranda*²⁰¹ were all wrongly decided; and that the taxing power does not permit purely regulatory taxes.²⁰² A future administration could make decisions

196. See Barron, *supra* note 58, at 77; Johnsen, *supra* note 43, at 56.

197. To be sure, one could deploy such a theory in favor of a different set of rights—for example, First Amendment rights to contest campaign-finance legislation or the right to bear arms protected by the Second Amendment.

198. OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3–4 (1988).

199. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

200. *Roe v. Wade*, 410 U.S. 113 (1973).

201. *Miranda v. Arizona*, 384 U.S. 436 (1966).

202. OFFICE OF LEGAL POLICY, *supra* note 198, at 3, 10–11, 44.

whether to enforce and defend on the basis of those constitutional understandings.²⁰³

The concern just voiced is a form of slippery-slope argument. Such arguments can be overused,²⁰⁴ they sometimes presuppose an unrealistic incapacity to draw plausible distinctions, and their empirical basis is often only guesswork.²⁰⁵ But the concern seems to me to be salient in the present context, in view of the potential interaction among several aspects of contemporary legal and political culture. First, the blossoming of constitutional theory has generated an extremely broad range of views about proper constitutional interpretation.²⁰⁶ Second, presidents may be tempted to equate what is misguided or immoral with what is unconstitutional; indeed, Justice Jackson said exactly that about FDR, a leader whom he served and greatly admired.²⁰⁷ Third, views about constitutional interpretation have partisan correlations.²⁰⁸ Fourth, the parties are increasingly polarized,²⁰⁹ and even if the policy issues of greatest concern to the public are rarely constitutional ones, a subset of constitutional issues

203. A strong policy of executive defense of acts of Congress does not ensure perfect stability in constitutional decisionmaking. It places broader authority in the courts, who may themselves shift course; after all, a key precedent in any challenge to DOMA or Don't Ask, Don't Tell, *Lawrence v. Texas*, overruled the Court's earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). But notwithstanding complaints about declining respect for stare decisis, see, e.g., Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1534 (2008); Linda Greenhouse, *Precedents Begin Falling for Roberts Court*, N.Y. TIMES, June 21, 2007, at A21, shifts in judicial attitude occur far more slowly than shifts in the executive. When control of the White House passes from one party to another, typically the entire White House staff and Justice Department leadership change, but the Supreme Court remains as it is until a vacancy arises.

204. See F.M. CORNFORD, *MICROCOSMOGRAPHIA ACADEMICA* 7 (Dunster House ed., 1923) ("The *Principle of the Dangerous Precedent* is that you should not now do an admittedly right action for fear you, or your equally timid successors, should not have the courage to do right in some future case, which, *ex hypothesi*, is essentially different, but superficially resembles the present one. Every public action which is not customary, either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time.").

205. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1132–34 (2003).

206. See Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 127.

207. ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 74 (2003).

208. See Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 391–400 (2011); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543, 554 (2005); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 113–15 (2004).

209. See Pildes, *supra* note 206, at 141.

may be politically salient because of their importance in particular electoral districts or with particular constituencies.²¹⁰ Finally, the ideal of judicial restraint has been in retreat for many decades.²¹¹ Put those together, and it is not hard to imagine the slope as becoming rather slippery indeed.

One other aspect of institutional practice is relevant in this regard. It is generally accepted that decisions to treat as unconstitutional a statute that is not obviously so should be made by the president personally, and in the case of politically salient statutes like DOMA and Don't Ask, Don't Tell, it is unrealistic to think that it could be otherwise. But presidential involvement, although it fosters accountability, also brings with it the political apparatus of the White House, which may not be dominated by legal values and which characteristically attends carefully to such concerns as interest-group pressures, relations with Congress, and electoral implications.²¹² I was privileged to serve a president with an uncommon knowledge of and commitment to constitutional principles, but in Madison's famous words, "[e]nlightened statesmen will not always be at the helm."²¹³ And I think a realistic appraisal of how presidents in general would be likely to make decisions whether to defend statutes would give rise to a less lyrical description of presidential constitutionalism than those often found in the literature.

There remains the example of the government's position in its amicus brief in *Brown v. Board of Education*.²¹⁴ I see no basis for questioning the government's position in *Brown*, and I have stressed that presidential constitutionalism is not illegitimate. But if the same standards should govern positions taken in amicus briefs that undermine federal statutes, and if the government was correct in

210. For discussion, see Frederick Schauer, *Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 5–24 (2006).

211. See Waxman, *supra* note 79, at 1074–75 (noting the sharp increase in the Supreme Court's invalidation of federal statutes in the late 1990s); see also Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 282–83 (2005) (“Comparative law scholars have occasionally examined the proclivities of different national courts toward activism. These efforts invariably rank the U.S. Supreme Court as world champion of activists.” (footnote omitted)); Pildes, *supra* note 208, at 142–44 (suggesting that “judicial review has become more assertive over time”); David Strauss, *Pop Con*, LEGAL AFF., Mar.–Apr. 2005, at 60 (arguing that “the Supreme Court has figured out a way to pursue an aggressive agenda without incurring too much popular opposition”).

212. See Levinson, *supra* note 55, at 380.

213. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

214. See *supra* text accompanying notes 121–26.

Brown, why wasn't it also correct in refusing to defend DOMA? To suggest that the nature of the problems differs risks being perceived as insensitive to the seriousness of contemporary discrimination against gays and lesbians. And yet *Brown* is an exceptional case, addressing the greatest deprivation of constitutional liberty—apart from slavery itself—that the United States has ever seen, one that included a virtually complete exclusion of the victims of discrimination from access to the political processes. Moreover, segregation critically affected national foreign-policy interests at the height of the Cold War,²¹⁵ interests that might be thought to transcend the interest in defending statutory provisions that governed only the District of Columbia and that could be fully defended by its officials.

In the end, once the legitimacy of presidential constitutionalism is acknowledged, any particular case presents a question of judgment. With *Brown* in mind, a defender of the government's ultimate decision on DOMA might contend, among other things, that it is difficult to demonstrate that any particular refusal to defend will have deleterious consequences. But by the same token, it might be hard to show that it will not. And in this regard, the DOMA decision must be viewed as quite a broad precedent for executive discretion to refuse to defend. For the decision did *not* involve a range of features that might argue for permitting the executive to refuse to enforce or defend an act of Congress: DOMA was not passed over a presidential veto resting on a constitutional objection; the issue is not one—like military readiness—over which the president might be thought to have a special grant of constitutional authority and claim to expertise; the statute was not a relic from a different era, nor was it a brand new enactment that was quickly deemed to be indefensible; it had been defended by prior administrations, and the precedents regarding its constitutionality were anything but uniformly against the statute's validity;²¹⁶ the refusal to defend did not involve a failure, after lower court decisions, to seek Supreme Court review, a situation that requires the solicitor general to consider the Court's limited docket;²¹⁷ the constitutional question did not depend upon statutory implementation by an independent agency that the president could

215. See Brief for the United States as Amicus Curiae, *supra* note 123, at 6, 1952 WL 82045, at *6.

216. See *supra* note 140.

217. See *Representation of Congress and Congressional Interests in Court*, *supra* note 48, at 6 (statement of Rex E. Lee, Assistant Attorney Gen., Civil Div., U.S. Dep't of Justice).

not control and that remained free to file its own brief in defense; and Congress did not overlook the constitutional question when passing the bill.²¹⁸ Thus, the precedent set by the refusal to defend DOMA is hardly a narrow one.

I emphasize the matter of precedent for two reasons. First, in considering such questions, administrations are likely to start with a review of past practice, which commonly weighs heavily within the executive branch.²¹⁹ Second, traditions like the duty to defend are not inevitable. Norms that seem to be well established can erode over time, as so much of our current political life illustrates. Thus, although I acknowledge the strength of the temptation to depart from the practice of defense in the case of DOMA, in my view, a great deal can be said for resisting that temptation and for seeking to maintain important norms whose fragility can easily be underestimated.

V. LITIGATION AND THE PROBLEM OF CONFLICTING PERSPECTIVES

I have so far expressed views about the proper course of action for the executive branch in defending acts of Congress. But whether or not one finds those views persuasive, unless executive practice were to change radically, the executive branch will, with some regularity, find itself defending against challenges to statutes that the incumbent administration believes to be unwise and would like to see repealed. When such cases come before the courts, judges must provide adequate latitude to permit a vigorous defense to take place without requiring the administration to misrepresent its own views about the wisdom or desirability of the statutory policy.

A hard problem arises in cases in which the official defendants are required to respond to discovery requests as to matters that could affect the outcome of the litigation, and about which they—and the administration they serve—have a view that is quite different from that of the Congress that enacted the statute. This very issue arose in litigation over Don't Ask, Don't Tell—well before its congressional repeal and well before the administration's determination, in the DOMA context, that heightened scrutiny applies to classifications based on sexual orientation. President Obama stated, while in office, that he believed that Don't Ask, Don't Tell did not contribute to, but

218. See, e.g., Johnsen, *supra* note 43, at 43–54 (discussing many of these factors in the context of decisions not to enforce).

219. See Morrison, *supra* note 65, at 1475–81 (detailing OLC's treatment of precedent).

rather weakened, national security.²²⁰ In one of the suits challenging Don't Ask, Don't Tell, the plaintiff cleverly filed a request for admission that essentially quoted the president, asking the defendants to admit that Don't Ask, Don't Tell "does not contribute to" and "weakens our national security."²²¹

Coming at a time when the executive branch was defending the statute, that request presented an obvious dilemma for the defendants. On the one hand, an admission would undermine what might have been the strongest possible defense of the statute: the claim that Congress could rationally have thought that Don't Ask, Don't Tell would strengthen our national security. On the other, a denial would have the defendants to the lawsuit—the United States and the secretary of defense—directly contradicting the position of the president. Accordingly, the Justice Department responded by admitting the request insofar as it sought the executive's view and denying it insofar as Congress could rationally have had a different view.²²²

That response, I believe, was an appropriate one for an executive branch trying to be faithful both to its commitment to defend congressional interests and to its obligation accurately to represent its views. The district court, however, sustained an objection to that response and required the government to "unqualifiedly admit or deny" the request for admission.²²³ The government came as close to its original position as it could without defying the judge's order, explaining in prefatory comments the difference in perspectives between the two political branches and making clear the president's view, but finally—when actually responding directly to the request for

220. See President Barack Obama, Remarks at a Reception Honoring Lesbian, Gay, Bisexual, and Transgender Pride Month, 1 PUB. PAPERS 927, 929 (June 29, 2009).

221. Plaintiffs' Request for Admission at 3–4, *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. CV 04-08425-VAP (Ex)).

222. See Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion for Review of Magistrate Judge's Discovery Ruling at 4, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV 04-08425-VAP (Ex)), 2010 WL 2171536, at *4 ("The President's statements set forth the Executive's view that the statute does not contribute to national security and, indeed, that it weakens it. But it was the considered judgment of Congress in 1993 that the statute was necessary for military effectiveness, and thus to ensure national security, and that statute remains in force today.").

223. Order (In Chambers) at 3, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV 04-8425-VAP (Ex)) (granting in part and denying in part plaintiffs' ex parte application for certain requests for admission to be deemed admitted); accord Minute Order Denying Defendants' Motion for Review of Magistrate Judge's Discovery Ruling (In Chambers) at 2, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV 04-08425-VAP (Ex)).

admission—stating that the United States had no choice but to deny that Don't Ask, Don't Tell does not contribute to and indeed weakens our national security.²²⁴

The district court seems to me to lack justification for having required an unqualified response. In this context, it is important to distinguish between the role of lawyers defending statutes and official parties responding to discovery requests. It is understood that the brief of an advocate—whether for the government or a private client—does not reflect the personal views of the lawyer. By contrast, when litigants—whether government officials or private persons—respond to inquiries posed in discovery, they are understood to be asserting their own views, truthfully²²⁵ and often under oath.²²⁶

The price of vigorously defending statutes with which the administration disagrees should not be to require that government officials make representations—much less representations under oath—with which they disagree. If the Supreme Court was correct in *New York v. United States*²²⁷ that political accountability is diminished if the federal government can compel the states to take actions that the states would not otherwise take,²²⁸ so too political accountability would be diminished if the executive branch or an executive official were forced to announce—as its own view as a party—a proposition that it did not believe. Nor should the price of making honest representations under oath be to undermine the capacity of the executive branch to present the strongest possible arguments in defense of federal statutes. Thus, courts hearing challenges to acts of Congress that the administration believes to be unwise and possibly unconstitutional must understand the complexity of the executive's role, and must provide the executive with the latitude necessary to fairly represent the potentially divergent positions of the two political branches.

224. Defendants' Supplemental Responses to Requests 3, 4, and 5 of Plaintiff's First Set of Requests for Admission at 3, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV 04-08425-VAP (Ex)).

225. *See, e.g.*, FED. R. CIV. P. 36(a)(4) (“If a matter [in a request for admission] is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it.”).

226. *See, e.g.*, FED. R. CIV. P. 30(c)(1) (depositions); *id.* R. 33(b)(3) (interrogatories).

227. *New York v. United States*, 505 U.S. 144 (1992).

228. *Id.* at 168.

CONCLUSION

The mixture of theoretical and institutional considerations that bear on the appropriate role of the executive in defending acts of Congress makes the topic a rich but difficult one. The difficulties are sharpened for officials who find the policies embodied in Don't Ask, Don't Tell and DOMA to be pernicious and degrading. The attorney general's letter made a plausible argument for heightened scrutiny, and even under a rational basis standard, the constitutionality of both Don't Ask, Don't Tell and DOMA is open to serious question.

The question whether under these circumstances the executive should continue to enforce and defend these statutes is not governed by a legal rule derivable from the Constitution itself; it is instead a matter of judgment, informed by a welter of historical and institutional concerns. In examining those concerns, I have tried to set forth a range of reasons why the executive branch should enforce and defend statutes such as Don't Ask, Don't Tell and DOMA—even when it views them as wrongheaded, discriminatory, and indeed as shameful denials of equal protection.