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The Indefensible Duty to Defend

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THE INDEFENSIBLE DUTY TO DEFEND

Neal Devins* & Saikrishna Prakash**

Modern Justice Department opinions insist that the executive branch must enforce and defend laws. In the first article to systematically examine Department of Justice refusals to defend, we make four points. First, the duties to enforce and defend lack any sound basis in the Constitution. Hence, while President Obama is right to refuse to defend the Defense of Marriage Act, he is wrong to continue to enforce a law he believes is unconstitutional. Second, rather than being grounded in the Constitution, the duties are better explained by the Department of Justice's (DOJ) desire to enhance its independence and status. By currying favor with the courts and Congress, the Department helps preserve its near-monopoly on government litigation authority. Third, our analysis of refusals to defend shows that the duty to defend only lightly constrains the executive, posing no real barrier to decisions not to defend the constitutionality of laws. Finally, the duty to defend serves no constitutional purpose. Its supposed benefits arise from getting the courts to opine on the constitutionality of laws. But courts typically have that opportunity as a result of executive enforcement of a law it believes is unconstitutional. Nothing further is gained by having the executive voice insincere and halfhearted arguments when others sincerely can advance strong ones. Or, we should say, nothing except enhancing the DOJ in the eyes of Congress and the courts at the expense of the President's constitutional vision, which is what the duty to defend is all about.

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INTRODUCTION

The belief that the President must enforce and defend laws that he thinks unconstitutional is widely held, although there is substantial disagreement over the obligation’s scope. Consider reactions to President Barack Obama’s February 2011 decision to enforce but not defend the Defense of Marriage Act (DOMA).¹ For some, the President’s decision to enforce but not defend the DOMA was “honest, transparent, and respect-

1. See Letter from Eric H. Holder, Jr., Att’y Gen. of the United States, to Hon. John H. Boehner, Speaker of the House (Feb. 23, 2011) [hereinafter Holder Letter], available at <http://talkingpointsmemo.com/documents/2011/02/letter-from-the-attorney-general-to-congress-on-litigation-involving-the-defense-of-marriage-act.php?page=1> (on file with the *Columbia Law Review*) (stating President will enforce but not defend the DOMA). In July 2011, the Department of Justice (DOJ) filed papers explaining why it thought same-sex classifications were subject to strict scrutiny review and, consequently, why the DOMA is unconstitutional. See generally Defendants’ Brief in Opposition to Motions to Dismiss, *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. C 3:10-00257-JSW) (arguing DOMA violates Equal Protection). In response, the Ninth Circuit Court of Appeals cited the administration’s nondefense of the DOMA in lifting the stay of a district court’s ruling that the “Don’t Ask Don’t Tell Act” violated the First Amendment. *Log Cabin Republicans v. United States*, Nos. 10-56634, 10-56813, at 2 (9th Cir. July 6, 2011), 2011 WL 2637191, at *1 (order lifting stay of district court’s judgment).

ful of the rule of law.”² Others were critical, claiming that because the Act is not clearly unconstitutional, he ought to have defended it.³

The President’s critics and defenders are both mistaken. Contrary to his critics, there simply is no duty to defend federal statutes the President believes are unconstitutional. Contrary to his defenders, there likewise is no duty to enforce such laws. Given President Obama’s belief that the DOMA is unconstitutional,⁴ he should neither enforce nor defend it.

The duty to enforce seems premised on the belief that courts should be, as Obama Attorney General Eric Holder declared, “the final arbiter of . . . constitutional claims.”⁵ The duty to defend seems grounded on the view that the Department of Justice generally should serve as Congress’s lawyer—defending congressional statutes that it or the President thinks are unconstitutional. Yet nothing in the Constitution requires the President to either subordinate his constitutional vision to the courts or serve as the mouthpiece of Congress before the courts. To the contrary, the duties to enforce and defend are inconsistent with the Constitution’s text and structure, both of which speak to the President’s responsibility to

2. Walter Dellinger, *The DOMA Decision*, *The New Republic* (Mar. 1, 2011, 12:00 AM), <http://www.tnr.com/article/politics/84353/gay-marriage-obama-gingrich-doma> (on file with the *Columbia Law Review*). For a nearly identical argument, see Peter M. Shane, *Not Defending DOMA: A Conscientious and Responsible Decision*, *Huffington Post* (Feb. 25, 2011, 2:26 PM), http://www.huffingtonpost.com/peter-m-shane/not-defending-defense-of-marriage_b_828348.html (on file with the *Columbia Law Review*) (praising Holder’s letter as a “careful, highly deliberate step . . . consistent with the . . . executive’s obligations towards the Constitution and the rule of law”).

3. See, e.g., Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA*, *The Volokh Conspiracy* (Feb. 23, 2011, 3:49 PM), <http://volokh.com/2011/02/23/the-executive-power-grab-in-the-decision-not-to-defend-doma> (on file with the *Columbia Law Review*) (arguing that by basing nondefense of DOMA on “a contested theory of the constitutionality of laws regulating gay rights . . . the Obama Administration has moved the goalposts of the usual role of the Executive branch”); Adam Winkler, *Why Obama Is Wrong on DOMA*, *Huffington Post* (Feb. 24, 2011, 12:01 PM), http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom_b_827676.html (on file with the *Columbia Law Review*) (arguing nondefense of DOMA “sets a terrible precedent”); John Yoo, *Obama Pushes the Limits of Executive Power in DOMA Decision*, *Ricochet* (Feb. 23, 2011, 2:26 PM), <http://ricochet.com/main-feed/Obama-Pushes-the-Limits-of-Executive-Power-in-DOMA-Decision> (on file with the *Columbia Law Review*) (asserting that “decision to no longer enforce [DOMA] . . . uses the legal system to short-circuit the normal political process”).

4. We take no position on the constitutionality of the DOMA. Indeed, our argument does not turn on whether one believes that the federal government’s failure to recognize gay marriage is unconstitutional or immoral. Even those who believe that the DOMA *is* constitutional should embrace our claims, or so we hope.

But we do note that because section 3 of DOMA is merely definitional it cannot, by itself, be unconstitutional. When the Administration says that section 3 is unconstitutional, we assume that what it means is that all those substantive laws that extend benefits based on marital status are unconstitutional because, pursuant to section 3, they unconstitutionally do not extend to gay marriages. In other words, when someone says that section 3 is unconstitutional what they really mean is that statutes that incorporate its definition of marriage are unconstitutional.

5. Holder Letter, *supra* note 1, at 5.

preserve, protect, and defend the Constitution as he understands it and even when the threat comes in the form of a statute. These duties are also normatively unattractive as they eliminate (or at least muzzle) a check on unconstitutional laws—a check wielded by the President, the only elected official with a nationwide constituency.

But even if one shrinks from our broad claim about the duty to enforce, meaning that one believes the President should enforce statutes that he believes are unconstitutional, there are absolutely no good constitutional reasons to preserve the duty to defend. There is no plausible argument that the Constitution obliges the President to press constitutional claims that he finds unpersuasive or objectionable, especially where others stand ready to make sincere arguments in defense of a law.⁶ If the goal is to have the courts judge the constitutionality of laws, the duty to enforce largely satisfies this goal, making the duty to defend pointless. Hence, even if one supposes that our broad claim is misguided, almost everyone should embrace our narrow reform to abolish the unnecessary duty to defend.

Our aim is to strip away the high-sounding justifications, shed light on the duties to enforce and defend, and judge the source and strengths of their foundations. Rather than being grounded in the Constitution, the duties actually serve the bureaucratic interests of the Justice Department, and, to a lesser extent, the political interests of the White House. Even though the duty to defend constrains the Justice Department (so that the Department occasionally defends federal statutes that it thinks are unconstitutional), the duty actually benefits the DOJ. Like all bureaucracies, the DOJ wants to retain and expand its authority while simultaneously protecting itself from political interference. Via the duties to enforce and defend and other traditions that emphasize the judiciary's power to settle legal disputes, the DOJ curries favor with the courts and Congress. The duties flatter the courts because they exalt them as the final arbiters of constitutional questions. The duties satisfy Congress because members prefer judicial (rather than executive) resolution of constitutional disputes. Moreover, the DOJ, which has a near-monopoly on government litigation and very little regulatory power, benefits when the courts have the last word on the constitutionality of federal statutes, in much the same way that litigators benefit from the dominance of courts. For its part, the White House is not especially interested in spending political capital on disputes over the constitutionality of federal statutes and, as such, the President is generally happy to adhere to the rhetoric of enforce and defend.

6. The DOMA episode illustrates the ability of others to come to a law's defense. Following the DOJ's announcement that it would not defend the statute, the House's Bipartisan Legal Advisory Group (made up of three members of the Republican majority and two members of the Democratic minority) took up the defense of the statute. See Jennifer Steinhauer, *House Republicans Step in to Defend Marriage Act and Dodge a Party Debate*, N.Y. Times, March 5, 2011, at A16.

We speak of rhetoric here because the duties to defend and enforce are not as binding as one might suppose. In fact, the duties are sufficiently malleable that when the DOJ leadership or the White House does not want to enforce or defend a federal statute, the duties pose no real obstacles. For instance, the DOJ has conveniently crafted a separation of powers exception, making the duties irrelevant on constitutional questions likely to be of most interest to the White House and DOJ leadership.⁷ Other exceptions are created, creatively interpreted, or expanded as needed.

In sum, the modern duties to enforce and defend curry good will with Congress and the courts, marginally favor the DOJ and its court-centered toolkit, and pose no real barrier to political appointees seeking changes in judicial doctrine. This is why the duties persist, despite having no basis in the Constitution.

This Article proceeds in five parts. Part I details numerous approaches to the duties to enforce and defend. Some administrations denied there were duties to enforce or defend; others claimed that the executive was always obliged to defend and enforce until a court ruled a statute unconstitutional; and in between these poles are a dizzying number of approaches. By showing that the DOJ has frequently recast the duties, especially in modern times, Part I undermines the idea that the duties are obligatory. Duties are not so binding if they change every eight years or as convenience suits.

Part II explains why the duties to enforce and defend have no place in the constitutional system. Each branch has powers and duties that require it to engage in constitutional interpretation, with nothing obliging it to adhere to the constitutional reasoning of others. The duties to enforce and defend are at odds with this principle, for they compel the President to not only execute schemes he believes to be unconstitutional but also to defend them in court. This conclusion is buttressed by the text of the Constitution—the President’s oath “to preserve, protect, and defend” it, the power to veto laws he thinks unconstitutional, the duty to “take Care that the laws be faithfully executed,” the power to seek opinions from executive officers, and, finally, the power to grant pardons. This conclusion is also supported by historical practice, including Thomas Jefferson’s refusal to enforce the Sedition Act,⁸ Bill Clinton’s support of the Religious Freedom Restoration Act,⁹ and President

7. See *infra* note 139 and accompanying text (noting DOJ support for separation of powers exception); *infra* note 251 and accompanying text (explaining that separation of powers disputes are highly visible and, as such, likely to be of interest to White House and DOJ officials).

8. See *infra* notes 20–29 and accompanying text.

9. Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 *Pub. Papers* 2000, 2000 (Nov. 16, 1993) (“[T]his act reverses the Supreme Court’s decision in *Employment Division against Smith* and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion . . .”).

Obama's efforts to limit the Supreme Court's invalidation of corporate election spending limits.¹⁰

Employing bureaucratic theory, Part III argues that the true source of the duties to enforce and defend is the self-interest of the Department of Justice. The duties are among those norms that the DOJ embraces in order to shield it from external influence and enhance the status of its lawyers. At the same time, the duties are malleable enough to be implemented in ways that respect both the President's quite limited constitutional agenda and Congress's desire for the courts to settle constitutional questions (by creating justiciable cases, typically by enforcing federal statutes).¹¹

Part IV focuses on cases where the DOJ has refused to defend.¹² We show that the DOJ implements the duty to defend in ways that simultaneously (1) embrace a court-centered focus that strengthens ties between the DOJ and the courts and Congress, (2) permit the DOJ to favor presidential power in separation of powers cases, and (3) allow significant wiggle room so that the President and DOJ can advance their constitutional agendas outside of separation of powers. Consistent with Part III, Part IV shows that the duty to defend principally serves to protect the DOJ as a bureaucracy.

Part V considers the practical upshot of abandoning the duties to enforce and defend. It responds to the claim that eliminating the duties yields bad consequences, namely presidential unilateralism and lawlessness. We predict that nonenforcement will likely occur only in those few cases where the law runs afoul of the President's clearly enunciated constitutional vision. We also call attention to the costs of the duties. One such cost is that the DOJ implements the duties in ways that obfuscate the President's constitutional vision. For example, after concluding that the DOMA was subject to heightened scrutiny because it reflected animus towards gays and lesbians and that it was unconstitutional under that standard, Attorney General Holder contended that courts would find the DOMA *constitutional* under rational basis review.¹³ He thereby suggested that the DOJ *would* defend the DOMA if courts applied the lower standard, meaning that the Administration might defend a statute that it believes is motivated by animus to a class of citizens.¹⁴ Rather than having

10. See Address Before a Joint Session of the Congress on the State of the Union, 2010 Daily Comp. Pres. Doc. 8 (Jan. 27, 2010) (encouraging Congress to pass bill regulating corporate election spending).

11. Because of increasing party polarization, there is reason to question Congress's continued willingness to meaningfully limit DOJ decisionmaking. See *infra* notes 220–243 and accompanying text (detailing interaction between congressional and DOJ authority).

12. For reasons detailed in Part IV, there is no way to systematically study presidential nonenforcement. See *infra* note 257.

13. See *infra* notes 293–298 and accompanying text (discussing Holder's analysis of DOMA's constitutionality).

14. See *infra* note 300 and accompanying text (highlighting inconsistency of Attorney General's positions).

his Administration's actions turn on what standard of review a court will (or should) apply, President Obama should just declare what he believes the constitutional standard to be and apply it.

I. THE DUTIES TO ENFORCE AND DEFEND AND THEIR MANY VARIATIONS

Under the duty to defend, the federal executive must defend the constitutionality of laws before the courts.¹⁵ The duty to defend is meaningful because, as we use the term, it only comes into play when the executive believes a law is unconstitutional. When the executive believes a federal law is constitutional, that conviction, rather than the duty to defend, leads the executive to defend the statute's constitutionality. The duty requires the executive to mouth insincere arguments, in the same way that private sector lawyers advance their clients' interests. In a sense, the duty envisions the DOJ as the lawyer and Congress as the client.¹⁶

The duty to defend is typically seen as a subset of a broader duty to enforce the law.¹⁷ As such, one might expect that the two duties would be coterminous. Yet the modern DOJ treats the duties as distinct. For instance, Attorney General Eric Holder recently distinguished the two duties, noting that the President would enforce, but not defend, the DOMA.¹⁸ President Bill Clinton took the same approach with respect to a law ousting individuals with HIV from the military.¹⁹

These brief descriptions of the duties to enforce and defend obscure the varying approaches that the executive has embraced over time. We recount some of these wildly disparate systems below.

15. The duty to defend does not require the executive to defend laws in the court of public opinion. Though one supposes that the executive could speak with dissonant voices, urging a law's constitutionality before the courts and simultaneously denouncing it to the public, we do not know if this has ever occurred. Administrations have occasionally filed briefs defending the constitutionality of a law while simultaneously signaling, in some way, doubts. See Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1081–83 (2001) [hereinafter Waxman, *Defending*] (discussing instances in which presidents signed laws while objecting to their constitutionality).

16. For an insightful critique of this proposition, see generally Brianne S. Gorod, *The Principal-Agent Problem: Defending Executive Non-Defense*, 106 Nw. U. L. Rev. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981744 (on file with the *Columbia Law Review*).

17. See, e.g., *The Att'y Gen.'s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 43 Op. Att'y Gen. 275, 276 (1980) (discussing duties in context of constitutional balance). See generally Waxman, *Defending*, supra note 15, at 1077 n.14 (noting "salient difference" between duty to defend and duty to enforce); Note, *Executive Discretion and Congressional Defense of Statutes*, 92 Yale L.J. 970, 972–75 (1983) [hereinafter Note, *Executive Discretion*] (discussing executive discretion over defense of statutes as subset of enforcement requirement). Again, as we use the phrase, the duty to enforce only comes into play when the President believes the law is unconstitutional.

18. Holder Letter, supra note 1, at 6.

19. See Chrysanthe Gussis, Note, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. Mich. J.L. Reform 591, 638 (1997) (contrasting decision not to defend with decisions not to enforce).

The first President to confront a law he believed unconstitutional utterly rejected any notion that he had to enforce and defend it. The Sedition Act, passed during the Presidency of John Adams, criminalized criticism of high-ranking federal officers.²⁰ Believing it was beyond the powers of Congress and violated the First Amendment,²¹ Thomas Jefferson resolved to render it a nullity. Besides pardoning Sedition Act convicts,²² he took other steps. Though the Act expired when he took office, its end did not terminate or prevent prosecutions of those who already had committed violations.²³ Nonetheless, Jefferson terminated ongoing cases²⁴ and never initiated new cases based on sedition that predated his Administration.²⁵

Two points are worth noting. First, Jefferson acted on his own sense of the Constitution. He clearly disagreed with the constitutional judgments of the Congress that enacted the Sedition Act.²⁶ Likewise, he did not look to the views of the Federalist-dominated courts as a prism that might bend his approach to the Constitution.²⁷ Several judges, including Supreme Court Justices, had dismissed claims that the Act was unconstitutional.²⁸ Second, as discussed in Part II, rather than supposing he had a duty to enforce and defend the Act, Jefferson declared that he had a duty to treat the Act as a nullity.²⁹

20. Alien and Sedition Act of 1798, ch. 74, §§ 1–3, 1 Stat. 596, 596–97.

21. See Kentucky Resolutions of 1798 and 1799, *in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 540, 541 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891) (rejecting Alien and Sedition Acts as unconstitutional).

22. See Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), *in* 8 *The Writings of Thomas Jefferson* 57, 57 n.1 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1897) (describing decision to stop prosecution of crimes under Alien and Sedition Act).

23. Alien and Sedition Act § 4, 1 Stat. at 597.

24. See Letter from Thomas Jefferson to William Duane (May 23, 1801), *in* 8 *The Writings of Thomas Jefferson*, *supra* note 22, at 54, 55 (indicating intention to “order a *nolle prosequi*” in such cases); Message from Thomas Jefferson to the Senate, *in* 8 *The Writings of Thomas Jefferson*, *supra* note 22 at 56, 56 (noting message may never have been transmitted to the Senate).

25. See Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 *Geo. L.J.* 1613, 1664–66 (2008) [hereinafter Prakash, *Duty to Disregard*] (describing Jefferson's rationale for ending prosecutions).

26. See Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *in* 1 *The Adams-Jefferson Letters* 274, 275 (Lester J. Cappon ed., 1959) (terming Alien and Sedition Act a “nullity”).

27. See *The Paragraph Omitted from the Final Draft of Jefferson's Message to Congress, December 8, 1801*, *in* 3 Albert J. Beveridge, *The Life of John Marshall* app. A at 605, 605 (1919) (propounding each branch's independent duty to judge constitutionality); see also Prakash, *Duty to Disregard*, *supra* note 25, at 1667–68 & nn.238–244 (describing Jefferson's arguments for independent constitutional review).

28. See Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* 50, 62 (2004) (noting Justices William Patterson and Samuel Chase concluded Act was constitutional).

29. See *infra* notes 81–85 and accompanying text (describing executive duty to avoid aiding or abetting constitutional violations).

Jefferson's uncompromising view held sway until 1865,³⁰ when Attorney General James Speed, writing just days after the assassination of Abraham Lincoln, added nuance. Speed wrote that an act vesting appointment powers in an assessor was unconstitutional, "void," and should be ignored by the new President, Andrew Johnson.³¹ The nuance came when Speed claimed that the President should act on his own constitutional conclusions, at least until courts had issued "an authoritative exposition" of the law.³² Speed thereby implied that once courts had authoritatively determined a law's constitutionality the executive had to acquiesce.³³

In 1868, President Andrew Johnson followed the Jeffersonian rule of ignoring a law he believed was unconstitutional. For his violation of the 1867 Tenure in Office Act, Johnson was impeached and almost convicted.³⁴ Johnson's managers argued that, like any man, he ought to be able to defy laws that he believed were unconstitutional.³⁵ They also argued that Johnson had chosen to disregard the law because doing so was the only way to get the courts to decide the Act's constitutionality.³⁶ As Johnson's counsel and former Supreme Court Justice Benjamin Curtis put it, when "a question arises whether a particular law has cut off a power confided to [the President] . . . , and he alone can cause a judicial decision to come between the two branches of the government to say which of them is right," the President can ignore the law and set the stage for a judicial resolution.³⁷

The 1919 opinion of A. Mitchell Palmer was a marked departure from the opinions of prior executives. At the outset, the Attorney General denied he could "declare an Act of Congress unconstitutional," save for

30. President James Monroe and James Buchanan's Attorney General Jeremiah Black both took Jeffersonian stances. See Special Message of James Monroe to the Senate of the United States, in 2 A *Compilation of the Messages and Papers of the Presidents: 1789–1897*, at 129, 133 (James D. Richardson ed., Bureau of Nat'l Literature 1897) (stating Monroe's view that a law restraining his ability to appoint would "be void"); see also Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469 (1866) (noting Black's view that "[e]very law is to be carried out so far as it is consistent with the Constitution, and no further," and "the sound part of it must be executed, and the vicious portion of it suffered to drop").

31. See Appointment of Assistant Assessors of Internal Revenue, 11 Op. Att'y Gen. 209, 212–14 (1865) (noting Speed's belief that vesting act was "clearly unconstitutional" because "power of appointing such officers devolves on the President").

32. *Id.* at 214.

33. *Id.*

34. 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 498 (1868) [hereinafter Trial of Andrew Johnson] (revealing only one more vote needed to successfully convict Andrew Johnson).

35. 1 Trial of Andrew Johnson, *supra* note 34, at 387 (statement of Benjamin Curtis) ("[I]t may be and has been a high and patriotic duty of a citizen to raise a question whether a law is within the Constitution of the country.")

36. *Id.*

37. *Id.*

when it infringed upon presidential power.³⁸ With respect to an act of “general application,” “it is the duty of the executive department to administer it until it is declared unconstitutional by the courts.”³⁹ Palmer never cited anything for this proposition and seemed unaware of early practice and opinions, for he never discussed either. In any event, as if to underscore the difficulty with hewing to his new rule, Palmer considered the constitutionality of a law of general application nonetheless, principally because a predecessor had suggested that a similar law was unconstitutional.⁴⁰ Even more perplexing, he ended by saying that the relevant law was not “so clearly unconstitutional that an executive officer would be justified in ignoring or disregarding it,” suggesting that executives could act upon the belief that an act was clearly unconstitutional.⁴¹

The very next year, the Woodrow Wilson Administration removed Portland Postmaster Frank S. Myers without receiving the Senate’s consent, as the 1867 Tenure of Office Act required.⁴² Perhaps this fit within Palmer’s presidential prerogative exception. Or perhaps the Administration thought the law was clearly unconstitutional. Whatever the case, the Supreme Court ruled that the President had power to remove Myers, saying nothing hinting that the President either had a duty to honor the removal restriction or a duty to defend the Act.⁴³ Throughout the case, the executive had decried the Act as unconstitutional.⁴⁴

In the years to come, several of Palmer’s successors vigorously endorsed his reluctance to question a federal law’s constitutionality.⁴⁵ Indeed, in 1937, Attorney General Homer Cummings claimed that only the President can have a “proper interest in questioning the validity of a measure passed by Congress, and that such interest ceases” after a President signs or vetoes a bill.⁴⁶ Cummings’s rule suggested that Presidents could

38. Income Tax—Salaries of President and Fed. Judges, 31 Op. Att’y Gen. 475, 476 (1919).

39. *Id.*

40. *Id.*

41. *Id.* at 489.

42. *Myers v. United States*, 272 U.S. 52, 56 (1926).

43. *Id.* at 176.

44. Saikrishna Prakash, *The Story of Myers and Its Wayward Successors: Going Postal on the Removal Power*, in *Presidential Power Stories* 165, 173–74, 177 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

45. See *Duty of Disbursing Officers to Make Disbursements Required Under the Agric. Adjustment Act*, 38 Op. Att’y Gen. 252, 253 (1935) (claiming that ministerial officers cannot question constitutionality of legislation that has no bearing on their constitutional rights); see also *Political Activity by State or Local Emps.*, 40 Op. Att’y Gen. 158, 160 (1942) (refusing to opine whether Hatch Act is unconstitutional after receiving letter forwarded by President from civil service commission and quoting the Palmer opinion); *Rendition of Ops. on Constitutionality of Statutes—Fed. Home Loan Bank Act*, 39 Op. Att’y Gen. 11 (1937) (detailing why Attorney General should not question constitutionality of a statute after President has approved).

46. *Renditions of Ops. on Constitutionality of Statutes—Fed. Home Loan Bank Act*, 39 Op. Att’y Gen. at 14; see also *Political Activity by State or Local Emps.*, 40 Op. Att’y Gen.

raise constitutional objections only at presentment and that, after a bill became law, every President had an ironclad duty to enforce it.

The question arose again in 1943, when Congress passed an appropriations rider barring salaries for executive officials thought to be communists.⁴⁷ Though President Franklin Roosevelt signed the bill, he denounced the rider as “not only unwise and discriminatory, but unconstitutional.”⁴⁸ Roosevelt might have ignored the rider as unconstitutional and paid salaries out of the appropriation that contained the rider. Had he taken that path, there never would have been a case.⁴⁹ Instead, because the Administration honored the rider and refused to pay the salaries of the alleged communists,⁵⁰ the aggrieved employees had standing to bring suit. In court, the employees argued that the rider amounted to an unconstitutional congressional removal and a bill of attainder.⁵¹ The executive agreed, never defending the rider’s constitutionality.⁵² The Supreme Court, in *United States v. Lovett*, held that the rider was a bill of attainder, that the Court could ignore it, and that the employees could be paid from the appropriation.⁵³ *Lovett* may have been the first case where the executive chose to honor an unconstitutional provision but not defend it.

In 1980, the phrase “duty to defend” found its way into DOJ opinions.⁵⁴ Prior to that time, there seems to have been no case where Attorneys General or other officials used that term or discussed the concept. The 1980 Office of Legal Counsel (OLC) opinion said that because the DOJ had a duty to defend a statute’s constitutionality, except in “exceptional circumstances,” it “may be appropriate to bring to a court’s at-

at 160 (invoking Cummings’s quote, “it is not within the province of the Attorney General to declare an act of Congress unconstitutional”).

47. See Act of July 12, 1943, 57 Stat. 451, 493 (prohibiting salaries for advocates of overthrowing government by force); 89 Cong. Rec. 479–84, 656 (1943) (debating constitutionality of appropriations rider). For a general discussion of the employee loyalty dispute, see Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 Yale L.J. 1 (1948).

48. 89 Cong. Rec. 7521 (1943).

49. Had the executive ignored the rider and used the appropriated funds to pay the employees, no one would have had standing to challenge the President’s action. No one would have had standing because no one would have suffered a particularized injury by virtue of the President’s decision to ignore the appropriations rider and pay the governmental employees.

50. See *United States v. Lovett*, 328 U.S. 303, 305 (1946) (noting respondents’ salaries were discontinued pursuant to Urgent Deficiency Appropriation Act).

51. *Id.* at 306.

52. *Id.*

53. *Id.* at 315–18.

54. *Constitutionality of Legislation Establishing the Cost Accounting Standards Bd.*, 4B Op. O.L.C. 697, 698 (1980). Another 1980 opinion, while embracing the duty, also said that if a law was “transparently invalid” the executive had to ignore it. *The Att’y Gen.’s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 56 n.1 (1980). In making this point, the opinion defended Thomas Jefferson’s refusal to enforce or defend the Sedition Act on these grounds. *Id.* at 58–59.

tion any plausible argument that would permit the court to uphold a statute.”⁵⁵

A 1984 opinion of OLC chief Theodore Olsen declared that as a general matter, it is for the “courts, and not the Executive, finally to decide whether a law is constitutional” and that executive actions that preclude judicial review “appear to be inconsistent with” the judicial power granted to the courts.⁵⁶ He listed two exceptions. First, the executive did not have to enforce and defend where the statute upset the interbranch equilibrium by impinging upon executive power.⁵⁷ Second, the opinion unequivocally said that “clearly unconstitutional” laws could be ignored.⁵⁸ The second exception, which seemed to echo the last part of Attorney General Palmer’s 1919 opinion, was apparently resuscitated in the 1970s in testimony before Congress.⁵⁹ Some have referred to this as a “risibility test” or as one former official put it: “If trying to state the defense of the statute does not have you rolling in the aisles, you should defend the statute.”⁶⁰

OLC head Walter Dellinger’s 1994 opinion added several wrinkles.⁶¹ He claimed that in nonseparation of powers controversies, the President had to enforce and defend unless he concluded that the law was unconstitutional and that the Supreme Court would agree.⁶² This arguably gave the executive less latitude than the “clearly unconstitutional” threshold because the President would have to enforce and defend all laws that the Supreme Court might uphold, even those he thought clearly unconstitutional. The opinion’s other new feature was the claim that decisions to enforce could be based on a desire to create a justiciable case.⁶³ This

55. *Constitutionality of Legislation Establishing the Cost Accounting Standards Bd.*, 4B Op. O.L.C. at 697.

56. *Recommendation that Dep’t of Justice Not Defend Constitutionality of Certain Provisions of Bankr. Amendments and Fed. Judgeship Act of 1984*, 8 Op. O.L.C. 183, 194 (1984).

57. *Id.* at 195.

58. *Id.* at 194; see also *The Att’y Gen.’s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 43 Op. Att’y Gen. 275, 275–77, 279 (1980) (claiming executive could choose not to defend transparently invalid statutes that upset equilibrium between executive and legislative branches).

59. See *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, 94th Cong. 12 (1975–1976)* (statement of Rex Lee, Assistant Att’y Gen., Civil Div., Dep’t of Justice) (claiming executive would not defend “patently unconstitutional” laws and asserting that this had happened only once).

60. *Rex E. Lee Conference on the Office of the Solicitor General of the United States: Pre-Reagan Panel*, 2003 *BYU L. Rev.* 1, 17, 31 (2003) (statement of Frank Easterbrook).

61. *Presidential Auth. to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 199 (1994).

62. *Id.* at 200 (“As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue.”).

63. *Id.* at 201 (“Also relevant [to the decision to enforce] is the likelihood that compliance or non-compliance will permit judicial resolution of the issue.”).

meant that sometimes, as in the case of penal or regulatory laws, the executive would enforce a law it believed to be unconstitutional in order to create a justiciable controversy. Other times, nonenforcement would pave the way to the courts, as in the case of benefits cases and alleged infringements of presidential power. Under either scenario, the DOJ could choose not to defend in court.

In 1996, President Bill Clinton enforced the statutory ouster of HIV-positive members of the military but declined to defend its constitutionality.⁶⁴ An OLC letter meant to explain the decision instead muddied the waters by stating there were “a variety of factors that bear on whether the Department will defend the constitutionality of a statute” without identifying those factors or how they bore on the act in question.⁶⁵

In his recent letter to House Speaker John Boehner, Attorney General Eric Holder added to the complexity. After arguing that the DOMA was unconstitutional, Holder noted that President Obama agreed.⁶⁶ The Attorney General then said that the President had decided to continue to enforce the DOMA, so as to satisfy his Faithful Execution Duty and to respect both the Congress that enacted the DOMA and the “judiciary as the final arbiter of the constitutional claims raised.”⁶⁷ Finally, the Attorney General declared the DOJ would not defend the DOMA.⁶⁸

The complexity came in the explanation for the decision not to defend. Holder first distinguished plausible or professionally responsible arguments from reasonable arguments.⁶⁹ Prior executives, when they embraced the duty to defend, had emphasized that a defense was necessary whenever a court might uphold a law as constitutional. Despite all but acknowledging that there were professionally responsible or plausible arguments that section 3 was constitutional, Holder declared that the DOJ would not defend.⁷⁰ Because the executive saw no reasonable arguments for the constitutionality of section 3, it had no obligation to make plausible or professionally responsible but unreasonable arguments in defense

64. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 567, 110 Stat. 186, 328 (amending 10 U.S.C. § 1177 (1996)) (repealed 1996). See generally Gussis, *supra* note 19, at 638 (noting President Clinton’s refusal to defend law he believed unconstitutional).

65. Letter from Andrew Fois, Assistant Att’y Gen., to the Hon. Orrin G. Hatch, Chairman, Comm. on the Judiciary, U.S. Senate 7 (Mar. 22, 1996) (on file with the *Columbia Law Review*). Though the Clinton strategy was designed in part to ensure judicial review, Congress repealed the statute, thus mooted the controversy. An Act of Apr. 26, 1996, Pub. L. No. 104-134, § 2707(a)(1), 110 Stat. 1321, 1321–30 (repealing 10 U.S.C. § 1177 (1996)).

66. Holder Letter, *supra* note 1, at 5.

67. *Id.*

68. *Id.* at 6.

69. *Id.* (“[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.”).

70. *Id.*

of it. Holder's distinction between plausible and reasonable arguments seems inconsistent with past practice. At a minimum, it is in grave tension with the 1980 opinion, which said that because the DOJ had a duty to defend a statute's constitutionality, it "may be appropriate to bring to a court's attention any plausible argument that would permit the court to uphold a statute."⁷¹

Holder gave an additional reason not to defend, perhaps sensing that the distinction between plausible and reasonable arguments might seem artificial or nonexistent. Citing a law review article by former Solicitor General Seth Waxman, Holder cryptically said that when the President declared that a statute was unconstitutional, that was sufficient reason not to defend its constitutionality before the courts.⁷² This suggested that when the President concluded that a law was unconstitutional, it did not matter whether reasonable arguments could be made in its defense. Purposefully or not, Holder had captured the discretionary nature of the duty to defend.

The approaches of different administrations are dizzying in their number and, occasionally, in their complexity. Some executives have claimed that the President should never enforce (much less defend) laws the President believes to be unconstitutional, no matter what the courts might say. Early practice well reflects this belief. At the other extreme is the claim that the President cannot raise constitutional objections after a bill has become law, the implication being that he has to enforce (and presumably) defend every single federal statute. In between are a multitude of approaches, including: that the executive should decline to enforce a law it believes is unconstitutional unless and until a court has concluded that it is constitutional; that it may (or must) decline to enforce or defend any law that impinges upon presidential power; that it may (or must) decline to enforce or defend when a law is clearly unconstitutional or lacks reasonable defenses; that it must enforce and defend unless the President believes that the law is unconstitutional and that the Supreme Court would agree; and that sometimes it should enforce, but not defend, a law it believes is unconstitutional. In any event, if the past is prologue, the Holder letter is unlikely to usher a new era of stability in approaches to the duties to enforce and defend. The letter likely means no more than that the Obama DOJ will not defend the DOMA, at least where strict scrutiny applies.

This Part ends with two related observations. One approach notably absent from this list is the claim that while the President always should create a justiciable case in order to facilitate judicial resolution of a law's

71. *Constitutionality of Legislation Establishing the Cost Accounting Standards Bd.*, 4B Op. O.L.C. 697, 697 (1980).

72. Holder Letter, *supra* note 1, at 5 ("Moreover, the Department has declined to defend a statute 'in cases which it is manifest that the President has concluded that the statute is unconstitutional,' as is the case here." (quoting Waxman, *Defending*, *supra* note 15, at 1083)).

constitutionality, he never should defend laws he thinks are unconstitutional. If judicial resolution is desirable as a means of checking executive interpretations of the Constitution, this approach facilitates such a check while never requiring the executive to voice insincere arguments. For the most part, this approach means that the president has a duty to enforce federal laws.⁷³ In cases involving the separation of powers and the disbursement of funds, however, there would be no duty to enforce or defend, as nonenforcement would be the only means of creating a justiciable controversy.

The failure of the DOJ to articulate this strategy is curious as it highlights the disjunction between rhetoric and practice. Focusing on modern practice, with all its twists and turns, while officials often express fealty to the duties to enforce and defend, they often act as if they only have a duty to create a justiciable controversy. Indeed, when justifying a decision not to enforce a restriction on presidential power, the executive notes that nonenforcement helps create a judicial controversy. Likewise when explaining a decision not to defend a federal statute, the executive often calls attention to the fact that the issue will nonetheless be litigated and that the courts will continue to serve as “the final arbiter of the constitutional claims.”⁷⁴ In so doing, the executive unwittingly highlights that when it comes to the duties to enforce and to defend, there is less than meets the eye.

II. THE CONSTITUTION AND THE DUTIES TO ENFORCE AND DEFEND

The duties to defend and to enforce are anathema to the text, structure, and early history of the Constitution. In fact, as President Thomas Jefferson argued,⁷⁵ the President faces the opposite obligation: He cannot subordinate himself to either the courts or Congress by enforcing statutes he believes are unconstitutional. Rather than resting on the Constitution, the duties to enforce and defend, as Part III reveals, are grounded on the bureaucratic interests of the Department of Justice.

Our constitutional claim rests on three principles.⁷⁶ First, the President’s constitutional oath—he must “preserve, protect, and defend” the

73. This “create a justiciable controversy but never defend” approach differs from the current DOJ policy. To begin with, whether enforcement or nonenforcement creates a justiciable controversy is but one factor in the Holder multifactor test. It is not decisive on the question of whether to enforce. Moreover, Holder’s letter endorsed a multifactor approach with respect to defending, thereby suggesting that the DOJ would sometimes defend statutes that it believed were unconstitutional. Holder Letter, *supra* note 1, at 5.

74. *Id.*

75. See Letter from Thomas Jefferson to Edward Livingston, *supra* note 22, at 57 n.1 (discussing Jefferson’s pardon of William Duane from his conviction under Sedition Act); see also Letter from Thomas Jefferson to Wilson Cary Nicholas (June 13, 1809), *in* 9 *The Writings of Thomas Jefferson*, *supra* note 22, at 253, 254 (discussing Jefferson’s intervention on behalf of individuals prosecuted under Sedition Act).

76. We are hardly the first to enunciate these three principles or the first to conclude that the President should act on his own sense of the Constitution. See, e.g., Frank H.

Constitution⁷⁷—forbids him from executing unconstitutional laws. The President should no more implement the unconstitutional laws of Congress than he should implement the unconstitutional machinations of his aides.

Second, the Constitution never anoints one branch as the Constitution's supreme expositor. In particular, nothing in the Constitution obliges any one to adopt the constitutional conclusions of others. The Congress need not follow the President, the President need not play second fiddle to Congress, and neither of them need kowtow to the Supreme Court, much less the inferior ones. Because the Constitution does not anoint an oracular institution with supreme authority over the Constitution's many Delphic phrases, the President may decide whether a law is constitutional, no less than the courts.

Third, the only plausible source of either a duty to enforce or defend, the Faithful Execution Clause, only applies to laws that are constitutional and not to anything purporting to be law. Because unconstitutional laws are void and hence not actual laws, the Clause does not oblige the President to enforce or defend them.

After discussing each of these principles, this Part ends by considering major objections to our broad claim that the President cannot execute, or defend the constitutionality of, laws that he believes are unconstitutional. We consider whether, if the President declined to enforce and

Easterbrook, *Presidential Review*, 40 *Case W. Res. L. Rev.* 905, 919–20 (1990) (noting unconstitutional laws are “no laws at all” and so cannot bind President under Take Care Clause); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 *Va. L. Rev.* 333, 370 (1998) (“[I]f ‘laws’ includes all acts of Congress, then the Take Care Clause imposes on the President an impossible obligation when a statute is logically inconsistent with the Constitution.”); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 *Iowa L. Rev.* 1267, 1303 (1996) (arguing President must refuse to enforce law he deems unconstitutional even if Congress, prior Presidents, and courts believed it constitutional); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217, 221 (1994) (“The President’s power to interpret the law is . . . precisely coordinate and coequal in authority to the Supreme Court’s.”); Saikrishna Prakash & John C. Yoo, *Against Interpretive Supremacy*, 103 *Mich. L. Rev.* 1539, 1564–66 (2005) (reviewing Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004)) (arguing for increased executive branch role in interpreting the Constitution).

Some scholars take a more measured approach, one more reflective of the modern DOJ position and more deferential to the courts. See, e.g., David A. Strauss, *Presidential Interpretation of the Constitution*, 15 *Cardozo L. Rev.* 113, 116 (1993) (contending President’s ability to autonomously interpret Constitution is fact-specific); David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, *Law & Contemp. Probs.*, Winter/Spring 2000, at 61, 62 (asserting nonenforcement should only be exercised “consistent with the resolution that the Supreme Court would reach”); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, *Law & Contemp. Probs.*, Winter/Spring 2000, at 7, 12 [hereinafter Johnsen, *Presidential Non-Enforcement*] (arguing executive determination of unconstitutionality must be respectful of separation of powers principles).

77. U.S. Const. art. II, § 1, cl. 8.

defend laws he regarded as unconstitutional, he would enjoy a suspending power of the type enjoyed by seventeenth-century English Kings. This Part also addresses whether the veto power suggests that after a bill becomes law the President cannot act upon his constitutional beliefs.

A. *Defending the Constitution Against Unconstitutional Laws*

Article II obliges the President to take an oath to preserve, protect, and defend the Constitution.⁷⁸ When he identifies a law as unconstitutional, he should not enforce it, for to execute it would be to erode, rather than preserve, the Constitution. In other words, even as Article II requires faithful execution of constitutional laws,⁷⁹ it forbids the executive from executing unconstitutional ones.⁸⁰

To see this more clearly, it is necessary to unpack the oath's implications. At a minimum, the oath means that the President cannot violate the Constitution himself. For instance, he cannot head next door to the Treasury Department and withdraw funds without an appropriation.⁸¹ One of the oath's other implications is that the President cannot aid or abet constitutional transgressions, for in that case no one would say that he was faithful to his oath to defend the Constitution. If his Secretaries contrived a plan to muzzle the press, the President could not, consistent with his oath and the First Amendment,⁸² support it or carry it into execution.

78. U.S. Const. art. II, § 1, cl. 8 (“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”).

79. U.S. Const. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”).

80. See, e.g., Ben Geslison, “The Court Will Clean it Up”: Confronting the Specter of Political Branch Dereliction of Duty, 15 *Tex. Rev. L. & Pol.* 165, 174–75 (2010) (arguing President has duty to reject pending legislation he deems unconstitutional); Gary Lawson, Everything I Need to Know About Presidents I Learned from Dr. Seuss, 24 *Harv. J.L. & Pub. Pol’y* 381, 390 (2001) (“The President has both the power and the duty to refuse to enforce laws that he determines . . . are unconstitutional.”); Lawson & Moore, *supra* note 76, at 1304–06, 1312–13 (asserting a “power of presidential review” not prohibited by the veto power or Take Care Clause); Paulsen, *supra* note 76, at 261–62 (“[T]he President’s oath *requires* that the President exercise full legal review over the lawfulness of other branches’ acts . . .”); Prakash, *Duty to Disregard*, *supra* note 25, at 1629 (“[T]he President must take care *not to faithfully execute* unconstitutional laws.”).

For an argument that the intersection of the Faithful Execution Clause and Supremacy Clause prohibits the President from enforcing unconstitutional laws, see Easterbrook, *supra* note 76, at 919; see also Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?: Hearing Before the H. Comm. on the Judiciary, 110th Cong. 118–21 (2007) (response to posthearing questions from Nicholas Quinn Rosenkranz), available at http://www.fas.org/irp/congress/2007_hr/signing.pdf (on file with the *Columbia Law Review*).

81. U.S. Const. art. I, § 9, cl. 7 (“No money shall be drawn from the treasury, but in consequence of appropriations made by law . . .”).

82. U.S. Const. amend. I.

The duty to preserve the Constitution and thus to avoid aiding or abetting constitutional violations does not apply differently depending upon the source of the unconstitutional scheme. If a foreign despot proposes that the President make him a Senator in return for a sizable contribution to the Treasury, the President must decline.⁸³ Because the source of an unconstitutional scheme has no bearing on the President's obligation to avoid aiding and abetting violations, the obligation applies equally to unconstitutional schemes emanating from Congress. For instance, if a federal law ordered the President to disregard judicial judgments, he would have to ignore the law because the Constitution vests the judicial power with the courts.⁸⁴

Because our claim counters recent executive opinion, some may be dubious. Yet our reform is more consistent with a Constitution premised on the nullity of unconstitutional statutes and the independence of the branches. Consider comments about the separation of powers and constitutional interpretation from our early history. While the Constitution was up for ratification, James Wilson, one of the biggest influences on the contours of Article II, affirmed that, like the courts, which had a duty to declare unconstitutional laws void, the President "could shield himself, and refuse to carry into effect an act that violates the Constitution."⁸⁵

Early Presidents agreed, believing that they had to resist unconstitutional congressional laws and schemes. When the House sought John Jay's treaty instructions, George Washington rebuffed it on the ground that because the House had no power over treaties, it had no business demanding the instructions: "[A] just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbid[s] a compliance with your request."⁸⁶ As he put it, his duty to "'preserve, protect and defend the Constitution'" necessarily constrained his desire to "harmonize with the other branches."⁸⁷

83. U.S. Const. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators *from each State . . .*" (emphasis added)).

84. U.S. Const. art. III, § 1. For the argument that the executive must enforce judicial judgments, see generally William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807 (2008) [hereinafter Baude, *Judgment*]. For an argument that the President need not heed judicial judgments, save for when they are criminal exonerations, see generally Paulsen, *supra* note 76. We believe that Paulsen's argument unduly minimizes the grant of judicial power. In particular, his argument fails to explain adequately why the judicial power meant something radically different in the English and American constitutional systems. While the U.S. Constitution is of course different from the English Constitution of the eighteenth century, we do not believe that the federal Constitution borrows a familiar phrase, the "judicial power," and implicitly drains it of its most significant power, the power to decide cases.

85. James Wilson, Speech at the Pennsylvania Ratification Convention (Dec. 1, 1787), *in* 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, *supra* note 21, at 443, 446 (emphasis omitted).

86. *H. Journal*, 4th Cong., 1st Sess. 489 (1796) (letter from President George Washington).

87. *Id.* at 488.

President Thomas Jefferson took resistance to another level. As noted above, Jefferson did not enforce the Sedition Act, defend its constitutionality, and wishfully hope that the Federalist-dominated federal courts saw through his arguments. Nor did he pursue the tack of enforcing the Act, declining to defend its constitutionality, and then attempting to convince courts that it was unconstitutional. Rather, Jefferson declined to enforce the Act because of the “obligations of an oath to protect the constitution, violated by an unauthorized act of Congress.”⁸⁸ He had a “duty to arrest [the Sedition Act’s] execution in every stage.”⁸⁹

Jefferson’s rejection of the duty to enforce laws he believed were unconstitutional meant that he could not offer any defense of the Sedition Act’s constitutionality in court.⁹⁰ Indeed, the executive’s failure to enforce a regulatory or penal statute on the grounds that it is unconstitutional often will preclude it from offering any constitutional defense of it. The only time the failure to enforce a statute will lead to a judicial reckoning is when someone suffers an injury due to an executive’s refusal to enforce. One such example is when the President refuses to abide by a restriction on his own powers, such as when the President ignores a removal restriction and the ousted officer sues in response.⁹¹ Another example is when the President refuses to disburse statutory benefits on the grounds that the statute is unconstitutional.⁹² In either context, the executive should not only refrain from defending the law’s constitutionality, it should file briefs explaining its infirmities. To defend the Constitution in this context requires the President to convince others in authority, in this case the courts, that the unconstitutional laws should not be enforced by the executive or the courts.

Modern OLC opinion recognizes that the President’s oath creates “[a]n obligation to take action to resist encroachments on his institutional authority by the Legislature [that] may be implied from [the] oath.”⁹³ This reading of the oath is indefensibly narrow. The oath does not single out the office of the Presidency for special solicitude. Rather, it requires the President to preserve, protect, and defend the *entire* Constitution. The same oath that requires him to resist encroachments

88. Letter from Thomas Jefferson to Abigail Adams, *supra* note 26, at 276.

89. *Id.* at 275.

90. Jefferson’s decision not to enforce precluded future judicial cases on the constitutionality of the Sedition Act. Yet further opportunities for judicial exposition likely would have served no purpose. The Federalist-dominated federal courts had already upheld the Sedition Act’s constitutionality and likely would have continued to do so.

91. See, e.g., *Myers v. United States*, 272 U.S. 52, 106–07 (1926) (discussing President’s removal of postmaster from office without Senate consent).

92. See *supra* notes 47–53 and accompanying text (describing Franklin Roosevelt Administration’s decision not to defend appropriations rider barring salary disbursements to suspected communists).

93. Recommendation that the Dep’t of Justice Not Defend the Constitutionality of Certain Provisions of the Bankr. Amendments and Fed. Judgeship Act of 1984, 8 Op. O.L.C. 183, 195 (1984).

on Article II requires him to resist violations of the Article III and the Bill of Rights. There is no principled, textual basis for why the OLC exalts the executive's pet peeve, infringements on executive power, above violations of freedom of speech or federalism.

In sum, as compared to modern iterations of the duties to enforce and defend, the views of Wilson, Washington, and Jefferson are far better grounded in the Constitution. The President must refuse to honor congressional schemes and statutes that he believes are unconstitutional because execution of them would make him an aider and abettor of unconstitutional plans, thereby violating his oath to preserve, protect, and defend the Constitution. Moreover, when the constitutionality of a federal statute comes before a court, the President, as part of his duty to defend the Constitution, should argue that the court ought to ignore the unconstitutional statute.

B. *Interpretive Independence*

Thus far we argue that the President must defend the Constitution, even when the threat comes from Congress. In so doing, we disagree with the claim in Attorney General James Speed's 1866 opinion, since echoed by some of his successors, that the courts, the Supreme Court in particular, have a preeminent role in statutory and constitutional interpretation.⁹⁴ Instead, we assume that the executive should decide for itself whether a law is constitutional.

Here we defend that assumption by advancing two related claims. First, nothing in the Constitution requires any one branch to accept the constitutional conclusions of another. Second, Presidents have long acted on their own understanding of the Constitution, believing that they had no duty to follow the constitutional readings of either Congress or the courts.

As a matter of text and structure, the Constitution creates a government in which each of the three federal branches may reach its own constitutional conclusions. As each tries to satisfy its duties and exercises its powers, each must weigh the constitutionality of its actions. In considering these grave matters, they may act upon their own conclusions, for the Constitution never crowns one branch the supreme expositor of the entire Constitution, such that the others must subscribe to its readings.⁹⁵ Congress is supreme with respect to impeachment, the President with respect to pardons, and the courts with respect to who wins cases. But the Constitution nowhere anoints any entity or branch as the final arbiter of the meaning of the laws or the Constitution.

94. See *supra* notes 30–33 and accompanying text (discussing Attorney General Speed's deference to courts' ultimate authority).

95. See Harrison, *supra* note 76, at 369–74 (arguing for “symmetry between executive and judicial review”).

Focusing on the President, the Constitution nowhere asks, much less demands, the President to seek or accept the constitutional views of other entities as he exercises his office and preserves, protects, and defends the Constitution. Consistent with our claim, there are no means by which he can demand the constitutional opinions of individual members or Congress as a whole. Similarly, he cannot demand the opinions of a district court judge, much less Justices.⁹⁶

There are two exceptions to this general principle. First, the President can demand the Senate's advice on nominees and treaties.⁹⁷ Yet, as the word "advice" connotes, he need not heed its suggestions, constitutional or otherwise. Rather than serving as a generic check on the President's constitutional vision, the advice and consent provisions merely establish that the President cannot appoint or make treaties without Senate consent.

Second, the President may demand opinions of the principal officers in the executive departments.⁹⁸ Again it is clear from the Clause's phrasing that the power to demand opinions ("he *may* require") does not come with any obligation to demand them or to follow any advice given. The Clause, fairly construed, makes clear that the President can demand opinions, if he wishes, and that he may make the final determination, notwithstanding the advice he receives. It has always been thus.⁹⁹ George Washington received conflicting opinions about the constitutionality of a National Bank before concluding that the Bank was constitutional;¹⁰⁰ Barack Obama likewise received conflicting opinions about the legality of his Libya campaign before concluding that he could bomb Libya.¹⁰¹

96. Presidents have asked for opinions from the Justices, sometimes formally and sometimes less so. See David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 93–94 (9th ed. 2011) (contrasting Supreme Court's refusal to issue advisory opinions with Justices' practice of advising Presidents on public policy). But Justices are under no obligation to respond. See, e.g., Letter from the Justices of the Supreme Court to President George Washington (Aug. 8, 1793), in Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* 179, 179–80 (1997) (declining to answer questions related to French treaties).

97. U.S. Const. art. II, § 2, cl. 2.

98. U.S. Const. art. II, § 2, cl. 1.

99. See 4 *The Records of the Federal Convention of 1787*, at 110 (Max Farrand ed., 1966) ("[T]he President will personally have the credit of good, or the censure of bad measures; since, though he may ask advice, he is to use his own judgment in following or rejecting it."); Letter from Alexander Hamilton, Concerning the Public Conduct and Character of John Adams, Esq., President of the United States (Oct. 24, 1800), in 25 *The Papers of Alexander Hamilton* 169, 214 (Harold C. Syrett ed., 1977) ("A President is not bound to conform to the advice of his Ministers. He is even under no positive injunction to ask or require it.").

100. See Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 *Duke L.J.* 110, 112 (1994) (discussing Attorney General's conclusion that Congress lacked power to create National Bank).

101. See Charlie Savage, *Two Top Lawyers Lost to Obama in Libya War Policy Debate*, *N.Y. Times*, June 17, 2011, at A1 ("President Obama rejected the views of top

Given that the Constitution never requires the President to seek opinions, never requires him to abide by any opinions received, and never grants him the authority to demand them from other branches, it seems clear that he need not accept the advice or legal conclusions that come from Congress or the courts.¹⁰² He should give Congress the benefit of the doubt on constitutional questions. And out of respect for the learning reflected in judicial opinions, he should do the same with the courts. But as a general matter, the President need no more adopt their statutory and constitutional conclusions than they need embrace his.

The President's interpretive independence from Congress should surprise no one. When the President ponders a bill he certainly does not adopt the implicit congressional view that should the bill become law it would be constitutional.¹⁰³ Indeed, if Presidents had to adopt congressional views on the constitutionality of bills, they could never veto them on the grounds that they were unconstitutional. Yet since George Washington issued the first veto,¹⁰⁴ Presidents have rejected bills based on the belief that Congress's constitutional conclusions can be wrong.¹⁰⁵

Or consider pardons.¹⁰⁶ The President does no violence to the Constitution when he decides that someone convicted of a crime is worthy of a pardon because he or she was the victim of an unconstitutional law.¹⁰⁷ This is so even if the judiciary has already concluded that the underlying law is constitutional. If people languish in jail pursuant to a law the President believes is unconstitutional, he should pardon them to keep faith with his oath to preserve the Constitution.

What is true for presentment and pardons is equally true for law execution. The President need not embrace the implicit view of an enacting Congress that all of its laws are constitutional. When President Jefferson refused to bow to the constitutional theories of the Congress that passed the Sedition Act or the President that signed it, he was right, for nothing

[government] lawyers . . . when he decided that he had the legal authority to continue . . . the air war in Libya without Congressional authorization . . .").

102. For the split between those who believe that the President should act on his own sense of the Constitution and those who believe the President should be deferential to the courts, see *supra* note 76.

103. U.S. Const. art. I, § 7.

104. See George Washington, Veto Message (Apr. 5, 1792), in *Veto Messages of the Presidents of the United States with the Action of Congress Thereon* 9, 9 (Washington D.C., Gov't Printing Office 1886) (discussing reason for veto).

105. Whether the President must veto bills that he believes contain unconstitutional provisions is disputed. Compare William Baude, *Signing Unconstitutional Laws*, 86 *Ind. L.J.* 303, 304 (2011) ("In a wide range of cases, there is nothing wrong with signing unconstitutional laws."), with Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 *Wm. & Mary Bill Rts. J.* 81, 81 (2007) ("[T]he President has a duty to veto bills when he believes they contain provisions that are unconstitutional.").

106. U.S. Const. art. II, § 2, cl. 1.

107. Cf. Letter from Thomas Jefferson to Edward Livingston, *supra* note 22, at 57 n.1 (discussing Jefferson's pardon of William Duane from his conviction under Sedition Act).

in the Constitution obliged him to accept the constitutional theories of the Fifth Congress or of John Adams.

The President's interpretive independence from Congress makes a good deal of sense. Congress is not designed to provide continuous guidance to the executive or anyone else. It is a bicameral, deliberative, and part-time body that reaches consensus only with difficulty. Moreover, it would be able to do little else if it had to continually direct or countermand, in real time, the executive's preliminary decisions.

What of a court's interpretation of the law—its sense of a law's meaning and its constitutionality? Many are certain that the executive must follow the wisdom of the courts. As the Supreme Court intimates from time to time, a court's power "to say what the law is"¹⁰⁸ is not just a power to reach conclusions about what the law means in the course of deciding cases; it is also the power to reach legal conclusions that all others must respect and adopt. On several occasions, the Court had deemed itself "supreme in the exposition of the law of the Constitution"¹⁰⁹ and insisted that its opinions and judgments are "the supreme law of the land."¹¹⁰

Self-aggrandizing declarations of supremacy invite skepticism. The Constitution never marks the Supreme Court supreme in its exposition of the Constitution over Presidents, Congress, the states, or the people. Indeed, as noted above, it says nothing about expositional supremacy at all, suggesting that no such supremacy was established.¹¹¹ Of course, the Supremacy Clause makes the Constitution and federal statutes supreme over state laws.¹¹² But this supremacy clearly says nothing about an interpretational hierarchy across branches, with the Supreme Court standing at the head. Likewise, the Supreme Court is supreme over other courts, in that other courts must look to the Supreme Court for guidance about federal statutes and the Constitution. But that intrabranched supremacy does not, by any stretch of the imagination, establish an interbranch supremacy, any more than the President's more thorough dominance of his branch establishes an interbranch supremacy over Congress and the courts.

Article III's case or controversy limitations also suggest that federal courts are not definitive diviners of the meaning of the law or the

108. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

109. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); see also *United States v. Morrison*, 529 U.S. 598, 616 (2000) ("Under our . . . Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace."); *Miller v. Johnson*, 515 U.S. 900, 923 (1995) ("[W]e think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act.").

110. *Cooper*, 358 U.S. at 18. For an inventory of other cases, including a discussion of how claims of judicial supremacy often coincide with elected branch challenges to judicial authority, see generally Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 *Va. L. Rev.* 83 (1998).

111. See Harrison, *supra* note 76, at 336 (arguing "no court is obliged to treat [unconstitutional] statutes as law because no one is so obliged").

112. U.S. Const. art. VI, § 2.

Constitution. Federal courts only have jurisdiction over cases or controversies, meaning that they cannot issue Article III judgments or opinions when they are not deciding cases or controversies. Yet there will be many situations, many questions, where federal courts cannot opine because there will be no case or controversy.¹¹³ It seems unlikely that the Constitution makes the judiciary supreme in its exposition yet greatly constrains its ability to expound. It would be akin to a requirement that religious acolytes obey a particular leader even though the leader is doctrinally incapable of opining on many crucial subjects. The point is that many constraints on the judiciary's power to say what the law is are strange and counterproductive if the judiciary was meant to decide, once and for all, the meaning of the law, including the Constitution. Someone crafting a system where the judiciary was meant to definitively determine the meaning of all laws likely would not have created a constitution that limited the ability of courts to provide guidance to those in need.

Or consider the same issue from a different perspective, namely the executive's ability to preclude judicial review. Suppose a penal statute is susceptible to two different interpretations, only one of which raises serious Ex Post Facto Clause issues. If the executive invokes the avoidance canon¹¹⁴ and chooses the reading that does not raise the constitutional issue, the executive's reading of the statute and the Constitution will be final because the courts will not be able to opine on either.

The executive can even have the final word on pure constitutional questions. When President Ronald Reagan acquiesced to the OLC conclusion that the Constitution never granted a line item veto to the President,¹¹⁵ the Supreme Court never had a chance to decide the question. Indeed, in order to get the matter before any court, Reagan would have had to exercise a line item veto. We believe that Reagan was right on the merits and on the absence of an obligation to exercise a line item veto in order to set up a test case for judicial resolution.

The more general point is that the executive branch regularly reaches statutory and constitutional conclusions that are final in the sense that they never find their way into court. This is entirely fitting, for nothing in the Constitution requires the executive to maximize judicial opportunities to opine. Routine executive finality over a host of statutory and

113. See, e.g., *Frothingham v. Mellon*, 262 U.S. 447, 486–89 (1923) (holding taxpayer lacked standing to challenge federal appropriations).

114. For a discussion of the constitutional avoidance canon, see William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 *Cornell L. Rev.* 831, 836–43 (2001); see also Johnsen, *Presidential Non-Enforcement*, *supra* note 76, at 28 (“The President must consider the constitutionality of statutes to enforce them, if only to engage in the uncontroversial practice of construing them when possible in a manner that avoids constitutional problems.”); Michael T. Crabb, Comment, “The Executive Branch Shall Construe”: The Canon of Constitutional Avoidance and the Presidential Signing Statement, 56 *U. Kan. L. Rev.* 711, 712 (2008) (arguing President may employ “the avoidance canon in order to construe a statute to avoid an unconstitutional application”).

115. *The President's Veto Power*, 12 *Op. O.L.C.* 128, 128 (1988).

constitutional matters sits rather uneasily with any notion that the Supreme Court is to decide ultimately, via its opinions, what the laws and Constitution mean.

If the special Supreme Court role referenced in recent Department of Justice opinions cannot be justified by text or structure, neither can it be justified by early opinion or practice. The founders never exalted the Supreme Court as some moderns do. Madison, writing as Publius, observed that, because the departments were “perfectly coordinate,” none of them could “pretend to an exclusive or superior right of settling the boundaries between their respective powers.”¹¹⁶ What Publius said about separation of powers applies equally to all constitutional questions—none can “pretend to an exclusive or superior right” of deciding the Constitution’s meaning.¹¹⁷

The same skepticism about the role of judicial opinions arises when looking at early practices. Consider, for example, famous presidential rebukes of the Supreme Court. Jefferson never treated William Marbury as an officer, notwithstanding *Marbury v. Madison* and its claim that John Adams had validly appointed Marbury.¹¹⁸ Andrew Jackson vetoed the Bank Bill despite John Marshall’s opinion in *McCulloch v. Maryland*.¹¹⁹ And Abraham Lincoln, in his famous inaugural address, pointedly declared that while *Dred Scott* decided who won a particular case, its rationale had no preclusive effect on new cases.¹²⁰

This approach continues in more recent times. Starting with Franklin Delano Roosevelt, nearly every President has embraced regulatory initiatives and legislative proposals intended to correct perceived constitutional errors by the Supreme Court.¹²¹ In recent memory, Bill Clinton signed legislation “reversing” Supreme Court religious liberty decisionmaking;¹²² Barack Obama not only denounced the Court’s opinion in *Citizens United*, he did so in front of several Justices.¹²³ These conspicuous episodes are part of a healthy interbranch dialogue, one in which the executive hardly treats the Court’s pronouncements as if they were the law themselves.

116. The Federalist No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

117. *Id.*

118. 5 U.S. (1 Cranch) 137, 151 (1803).

119. Veto Message from Andrew Jackson to the Senate, July 10, 1832, in *Veto Messages of the Presidents of the United States with the Action of Congress Thereon*, supra note 104, at 88.

120. Abraham Lincoln’s First Inaugural Address, Mar. 4, 1861, in *Addresses of the Presidents of the United States* 133, 138–39 (1989).

121. See Neal Devins & Louis Fisher, *The Democratic Constitution* 221 (2004) (listing Roosevelt’s “court packing proposal, Richard Nixon’s campaign to undo Warren Court liberalism, Ronald Reagan’s attack on *Roe v. Wade*, and Bill Clinton’s signing of the Religious Freedom Restoration Act”).

122. Remarks on Signing the Religious Freedom Restoration Act of 1993, supra note 9.

123. See Adam Liptak, *A Rare Rebuke, In Front of a Nation*, N.Y. Times, Jan. 29, 2010, at A12.

In sum, to imagine that the Constitution marks the Supreme Court as supreme in its exposition of the Constitution and laws of the United States, one has to believe two implausible propositions. One has to presume that a Constitution that never grants the Supreme Court a general power to decide all legal questions nonetheless cedes the Court a power to definitively answer such questions in some instances. And one has to discover, buried deep within the Constitution's interstices, an inter-branch supremacy on constitutional and legal interpretation even though the Constitution contains nary a word hinting at such dominance.

Just to be clear, the President is not above the other branches and he cannot, in the manner of some autocrat, ignore their lawful decisions. To the contrary, the President must faithfully execute the constitutional laws passed by Congress. Likewise, the President must faithfully execute judicial judgments because the power to decide who wins or loses a case rests with those who wield the judicial power. This obligation to enforce judgments exists as an implication of the separation of executive and judicial power.¹²⁴ And finally, we are not denying the constitutionality of judicial review. When the courts conclude that some statute cannot be applied to a particular party because it is unconstitutional, the executive cannot apply that statute to the party. We just deny that in the course of deciding who wins and loses particular cases the judiciary authoritatively may declare what the law means for all three branches and the nation. While respect is due to the Supreme Court's opinions, submission is not.

C. *The Faithful Execution Clause and Unconstitutional Laws*

The Faithful Execution Clause requires the President to execute the laws.¹²⁵ Some believe that this Clause requires the President to enforce laws and to defend them when someone challenges their constitutionality.¹²⁶ We disagree. The Faithful Execution Clause does not require the President to enforce unconstitutional laws or make faithless arguments in their defense. To see why, we need a better grasp of what constitutes a law.

It is clear that the Clause does not apply to all actual or putative laws. The President need not execute the law of the Federal Republic of Germany. Further, not everything purporting to be federal law is a "law"

124. See generally Baude, *Judgment*, *supra* note 84. This implied duty to enforce judicial judgments does not imply a duty to accept judicial opinions. In standing ready to execute judicial judgments, the President need not agree with the legal conclusions underlying them.

125. U.S. Const. art. II, § 1, cl. 8. See generally Steven C. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 *Yale L.J.* 541 (1994) (examining executive power scholarship and offering "unitary executive" perspective); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 *U. Ill. L. Rev.* 701 (discussing President's power to execute laws). For a discussion of the Faithful Execution Clause and the President's law execution power, see *id.* at 720–26.

126. See generally Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative* (1998).

for faithful execution purposes. A text styled as law and passed by the House, but not by the Senate and not presented to the President, is, despite the label, not federal law. For something to be subject to the execution duty, it must satisfy Article I, section 7.¹²⁷

Likewise, for something to be law subject to the execution duty, it must be substantively proper. Under our constitutional system, federal and state directives purporting to be law are not law at all when they are inconsistent with the Constitution. The invalidity of federal laws inconsistent with the Constitution arises from the idea, common at the Constitution's founding, that any law, federal or state, inconsistent with fundamental, higher law is void.¹²⁸ This was a background assumption, in the same way that routine executive enforcement of judicial judgments was an assumption of that era and an implied feature of the Constitution.

Of course, judicial nonenforcement of unconstitutional federal laws is a longstanding and accepted feature of our Constitution. Even before *Marbury*, federal and state courts declared that they would not enforce unconstitutional laws.¹²⁹ Federal judges said this even though courts, no less than the President, have a duty to faithfully execute federal law.¹³⁰ Indeed, even had the Constitution expressly required the courts to take care that federal laws be faithfully executed, it is doubtful that such text would have signaled that the courts had to enforce unconstitutional statutes. Again, to say that one must execute the laws hardly implies that one must execute anything purporting to be law. Just as the courts may refrain from enforcing unconstitutional laws despite their implied obligation to execute federal law, so too the executive need not enforce those laws despite his express duty to execute federal laws. In all cases of conflict between superior and inferior law, the superior trumps, as Justice Marshall wrote in *Marbury*.¹³¹

127. U.S. Const. art. I, § 7.

128. See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 933 (2003) (noting state courts in preconstitutional period deemed statutes to violate fundamental charter without clear textual authority to do so).

129. See, e.g., *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Chase, J.) (“[I]t is expressly admitted by all this bar . . . that the Supreme Court can declare an act of congress to be unconstitutional”); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.) (stating because legislation was constitutional “it is unnecessary . . . to determine whether this Court *constitutionally* possesses the power to declare an act of congress [unconstitutional]”); *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795) (opinion of Patterson, J.) (“Whatever may be the case in other countries, yet in this there can be no doubt, that every act of legislature, repugnant to the constitution, is absolutely void.”); *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792) (discussing Circuit Court of New York’s finding that law was unconstitutional).

130. The judiciary executes the law, albeit in a manner different than the executive. See 2 *The Records of the Federal Convention of 1787*, supra note 99, at 34 (comments of James Madison) (“There was an analogy between the Executive & Judiciary departments in several respects. The latter executed the laws in certain cases as the former did in others. The former expounded & applied them for certain purposes, as the latter did for others.”).

131. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803).

The absence of a duty to enforce laws that the President believes are unconstitutional is in keeping with the country's earliest practices. Americans regarded unconstitutional laws as nullities, not things to be faithfully executed. That tradition was a legacy of the fight with Parliament and its laws that regulated commerce with the colonies. Americans did not say that the Stamp Act and other such laws were constitutional and had to be followed until such time as a court declared them void; such acts were nullities even before any judicial intervention. John Adams argued as much before the colonial governor and council of Massachusetts, encouraging them to defy the Act.¹³² This conception flourished after independence and is a legacy of our ratification experience, with many affirming that unconstitutional federal laws "could not be enforced" because they were nullities.¹³³

The faithful execution duty did not transform objects that were widely considered nullities into proper objects of enforcement. Writing as Publius, James Madison noted that the "success" of a congressional usurpation would "depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts."¹³⁴ He meant that because executives and judges had to execute the laws, both had the opportunity to thwart legislative usurpations through inaction, a claim premised in part on the President's ability to refuse to enforce unconstitutional statutes notwithstanding his faithful execution duty.¹³⁵ Thomas Jefferson agreed with Publius. When refusing to enforce the Sedition Act, he argued that because "the sedition law was unconstitutional and null . . . my obligation to execute what was law, involved that of not suffering rights secured by valid laws, to be prostrated by what was no law."¹³⁶

Recognizing the folly of reading the Faithful Execution Clause as requiring the enforcement of all procedurally proper laws, modern DOJ officials have created a laundry list of exceptions to the duties to enforce and defend. The duties do not apply when the law is "clearly unconstitu-

132. See 3 John Adams, *Diary and Autobiography of John Adams* 283 (L.H. Butterfield ed., 1964) (arguing "Stamp Act was null because unconstitutional").

133. 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, supra note 21, at 162.

134. *The Federalist* No. 44, supra note 116, at 286 (James Madison).

135. As noted, James Wilson similarly declared that the President could shield himself and avoid executing unconstitutional laws. See supra note 85 and accompanying text. Given that Pennsylvania had a precursor of the Faithful Execution Clause, his claim is especially illuminating.

136. Letter from Thomas Jefferson to Wilson Cary Nicholas (June 13, 1809), in 9 *The Writings of Thomas Jefferson*, supra note 22, at 253, 254; see also Letter from Thomas Jefferson to Edward Livingston, supra note 22, at 57 n.1 (noting Sedition Act was a "nullity" and had no bearing on his duty to have the "laws executed").

tional,”¹³⁷ is “transparently invalid,”¹³⁸ or meets some similar standard; the Clause does not apply when the executive believes that the law encroaches upon presidential powers;¹³⁹ and the faithful execution duty does not apply, and the executive need not enforce or defend, when upholding the law would require the Supreme Court to overturn its precedents.¹⁴⁰

These arguments reflect wishful thinking, taking no account of the Clause’s text. Either the Clause applies to all procedurally proper laws, no matter their constitutionality, subject matter, or consonance with judicial precedent, or it applies to none. There is no textual warrant for saying that clearly unconstitutional laws are not laws for purposes of the Clause, but that statutes merely more likely than not unconstitutional are laws within the meaning of the Clause. Nor is there any basis for imagining that there is a separation of powers exception in the Faithful Execution Clause. Furthermore, there is nothing suggesting that whether something is a law for purposes of the Clause turns on Supreme Court precedent. Something is, or is not, law, regardless of what the Court may say in its opinions.

Finally, the Constitution never bifurcates the duty to take care that the laws be faithfully executed, generally requiring the executive to enforce laws but authorizing him to decline to defend them in some cases. When the President believes a law is unconstitutional, the Faithful Execution Clause imposes neither a duty to enforce nor a duty to defend. But even if that view is mistaken, a reading of the Faithful Execution Clause does not yield a duty to defend with some exceptions and a duty to enforce with even more. Discovering such precious and complicated distinctions in the Clause is an artifact of a desire to temper what would otherwise be an absurd policy of enforcing all procedurally proper laws—a result few, if any, believe is required by, or consistent with, the Constitution.

D. *Arguments Against Our Claim*

Here we address two arguments against our claim. First, some claim that if the President could choose not to enforce laws, he would have the power to suspend laws, a defunct power associated with the seventeenth-

137. *Income Tax—Salaries of President & Fed. Judges*, 31 Op. Att’y Gen. 475, 489 (1919).

138. *The Att’y Gen.’s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 56 n.1 (1980) (citing *Walker v. City of Birmingham*, 388 U.S. 307, 515 (1967)).

139. *Presidential Auth. to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 201 (1994).

140. *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. O.L.C. 13, 26 (1982) (noting DOJ need not defend law “when prior precedent overwhelmingly indicates that the statute is invalid”).

century English monarchy.¹⁴¹ The implication is that the President cannot have a power that the Crown did not have in the eighteenth century.¹⁴² Second, some assert that presentment is the only stage at which the President can act on his constitutional misgivings.¹⁴³ Once a bill becomes law, the time for constitutional theorizing on the part of the executive has passed.

The President's obligation to leave unconstitutional laws unenforced is rather different from the seventeenth-century Crown's discretionary power to suspend. The former is a duty arising out of the President's oath to preserve, protect, and defend the Constitution while the latter could be exercised whether or not the Crown believed the law to be consistent with the English Constitution.¹⁴⁴ Just as it is wrong to argue that courts have a suspending power merely because judges must refuse to enforce unconstitutional laws, it is equally mistaken to believe that the President exercises a suspending power when he refuses to enforce unconstitutional laws.

The argument that presentment is the only occasion for the President to act on his constitutional misgivings about legislative enactments is likewise implausible. To begin with, nothing in the Presentment Clause¹⁴⁵ or anything else in the Constitution declares that the President can act upon his constitutional scruples only when presented with a bill. To the contrary, it is obvious that the President can defend the Constitution by pardoning people convicted under unconstitutional laws, as Thomas Jefferson did with respect to the Sedition Act. More generally, the President can use any of his powers to satisfy his presidential oath. Sometimes inaction, failing to lift a finger to further an unconstitutional plan, is the best means of defending the Constitution.

Moreover, just as one administration cannot bind its successors to its policy views, one President cannot bind his successors to his views on the Constitution.¹⁴⁶ In particular, the fact that an earlier President did not veto a bill that he thought constitutional does not prevent his successors

141. See May, *supra* note 126, at 16–18 (arguing Take Care Clause draws no distinction between constitutional and unconstitutional laws).

142. The intuition is that because the President was evidently meant to be weaker than the English King, the Constitution should not be read to convey implied powers to the President that the eighteenth-century English monarchy lacked.

143. See May, *supra* note 126, at 29–33 (arguing “executive’s right to ignore selected parts of a law” is inconsistent with veto power).

144. See F.W. Maitland, *The Constitutional History of England* 302–03 (1908) (describing suspension power and its relation to dispensing power); Carolyn A. Edie, *Tactics and Strategies: Parliament’s Attack upon the Royal Dispensing Power 1597–1689*, 29 *Am. J. Legal Hist.* 197, 198 (1985) (discussing contours of dispensing power).

145. U.S. Const. art. I, § 7, cl. 2.

146. See Jeremy Rabkin & Neal Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 *Stan. L. Rev.* 203, 206–07 (1987) (arguing one administration cannot use court-approved consent decrees to bind subsequent administrations to otherwise discretionary policy choices).

from both concluding that an existing law is unconstitutional and acting on that conclusion, as Thomas Jefferson did upon assuming office.¹⁴⁷ Just as a Congress may reject the constitutional wisdom of its predecessors and just as there is nothing like *res judicata* for judicial constructions of the Constitution, there is no such thing as executive estoppel.

Does this mean that the President gets two bites at the constitutional apple, one at presentment and one at the enforcement stage? Yes. Indeed, the President gets multiple bites. The President can and should speak up against unconstitutional legislation even prior to presentment, in a bid to dissuade its passage by Congress. He can and should veto unconstitutional legislation. He can press for repeal and decline to enforce, when his assistance is required for its implementation. And he can pardon those who violate an unconstitutional statute, including those convicted under prior administrations and those who might be prosecuted by future administrations that might have a different sense of the law's constitutionality.

The Constitution establishes a belt, suspender, and rope approach to its defense, with Congress, the courts, the states, the people, and the President all having roles to play. Congress should consider the constitutionality of the bills it debates; the courts must do the same when presented with a claim of unconstitutionality; and the people must decide whether their agents have been faithful to the Constitution. The fact that the President has multiple means of defending the Constitution and thereby satisfying his oath is hardly surprising.

III. THE REALPOLITIK OF THE DUTIES TO ENFORCE AND DEFEND

Parts I and II make clear that the President should independently interpret the Constitution and enforce and defend only those statutes he thinks constitutional. He should not subordinate his constitutional vision to either Congress (by having the Justice Department function as Congress's lawyer, defending federal statutes that he thinks unconstitutional) or the courts (by enforcing or defending laws so that the Supreme Court can issue a definitive ruling).

Furthermore, common sense suggests that Presidents generally will advance a constitutional vision that expands, not contracts, executive power. Through expansive interpretations of their powers, Presidents simultaneously gain policy advantage and "push[] out the boundaries of their power."¹⁴⁸ For example, after Congress refused to back either Bill Clinton's health-care initiative or George W. Bush's faith-based initiative, each bypassed Congress, using Executive Orders.¹⁴⁹

147. See *supra* notes 20–25 and accompanying text (describing Jefferson's termination and prevention of Seditious Act prosecutions).

148. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J.L. Econ. & Org.* 132, 138 (1999).

149. William G. Howell, *Unilateral Powers: A Brief Overview*, 35 *Presidential Stud. Q.* 417, 418, 434–35 (2005).

Yet there is something of a mystery. Rather than embrace duties that limit its power to advance its preferred constitutional vision, one would predict that the executive would embrace theories of executive power that protect presidential prerogatives. Whatever one thinks of our analysis of the Constitution, Parts I and II make clear that there is a rather plausible interpretation of the Constitution that cuts against the duties to enforce and defend, one advanced by executives from the Constitution's beginnings. Why then does the Justice Department embrace a suspect constitutional theory that, at least superficially, limits presidential prerogatives and Justice Department discretion?

The answer lies in the self-interest of the Justice Department. Along with other neutral-sounding norms and traditions that ostensibly place limits on the power of the Department, the duties to defend and enforce hamper efforts by the White House and other actors to impinge upon DOJ autonomy and power. Furthermore, by embracing the power of federal courts to authoritatively settle constitutional disputes, the duties to enforce and defend enhance its special status with those courts, especially the Supreme Court.

Bureaucratic theory drives our analysis.¹⁵⁰ At the DOJ, political appointees and careerists alike enhance their Department's autonomy and their status by embracing the duties to defend and enforce and other widely shared norms and traditions, customs that aid them in turf wars with the White House and other departments. At the same time, the duty is malleable, with vague exceptions that allow Justice Department officials to further both their own legal policy preferences and the desires of the White House and Congress.¹⁵¹ This malleability, too, is consistent with bureaucratic theory. Because "democratic politics" "requires accountability" the "best a government executive can do is to minimize," not eliminate, external control.¹⁵²

A. *The Department of Justice and Bureaucratic Theory*

Bureaucratic theory looks to the organization of a government agency and the interests of the individuals who work there to understand agency decisionmaking. Agencies with a jurisdictional monopoly, for example, "have few or no bureaucratic rivals and a minimum of political constraints imposed on them by [political] superiors."¹⁵³ To perpetuate

150. See generally James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (1989) [hereinafter, Wilson, *Bureaucracy*] (examining wide range of bureaucracies and providing analysis of agency operations). For an insightful discussion of the applicability of bureaucratic theory to Solicitor General claims of independence, see generally John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 *Stan. L. Rev.* 799 (1992) [hereinafter McGinnis, *Principle Versus Politics*].

151. See *infra* Part IV (examining DOJ's use of exception to the duty to defend to serve its self-interest).

152. Wilson, *Bureaucracy*, *supra* note 150, at 188.

153. *Id.* at 182.

such autonomy, agencies protect their turf and their status by fighting organizations that seek to perform similar tasks, avoiding conflicts with constituents, and inculcating “a widely shared and approved understanding of the central tasks of the agency.”¹⁵⁴

The Department of Justice, like other bureaucracies, seeks to expand its power by embracing norms that build “reputations for efficacy, for uniqueness of service, for moral protection, and for expertise.”¹⁵⁵ Consider, for example, the claim that government litigation authority should be centralized in the Department of Justice.¹⁵⁶ The DOJ’s power, prestige, and ability to recruit top graduates who otherwise would gravitate to the nation’s leading law firms is linked to its litigation authority, including the authority to decide what arguments to make in court.

It therefore comes as no surprise that the DOJ has well-rehearsed arguments on why the national interest is served by its control of litigation. Agency lawyers, according to the DOJ, are too specialized, too prone to tunnel vision, and only consider what is best for their agency, overlooking how their arguments affect other agencies.¹⁵⁷ Further, because the DOJ does not appeal all defeats, it focuses its energies on winnable, high stakes cases, thereby creating “a pool of goodwill and credibility with courts that enhances the prospects for favorable litigation outcomes.”¹⁵⁸

These arguments are certainly overstated. They minimize the benefits of agency expertise and reject middle-ground approaches in which agency lawyers share litigation authority with the DOJ.¹⁵⁹ Whether or not DOJ arguments for centralized litigation are “myths used to justify [self-

154. *Id.* (citing Philip Selznick, *Leadership in Administration: A Sociological Interpretation* 121 (1957)). For Justice Department attorneys, a belief in agency neutrality and autonomy is critical to their decision to work for the DOJ and not a private law firm. See *infra* notes 163–164 (discussing DOJ’s ability to recruit top lawyers). In this way, DOJ lawyers are motivated to embrace this vision of the Department. See Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 *Duke L.J.* 307, 353–54 (2001) (discussing role of “motivation” in lawyers’ beliefs).

155. Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy* 353 (2001); see also Gregory A. Huber, *The Craft of Bureaucratic Neutrality* 14 (2007) (arguing agency heads engage in “strategic neutrality” to pursue policy objectives with limited political interference).

156. For a summary of DOJ arguments in support of centralized litigation authority, see generally *The Att’y Gen.’s Role as Chief Litigator for the United States*, 6 *Op. O.L.C.* 47 (1982). For a fuller presentation of DOJ arguments and a critique of those arguments, see generally Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 *U. Pa. J. Const. L.* 558 (2003) [hereinafter Devins & Herz, *Uneasy Case*].

157. See Devins & Herz, *Uneasy Case*, *supra* note 156, at 570–94 (describing justifications for centralized government litigation by DOJ).

158. Nicholas S. Zeppos, *Department of Justice Litigation: Externalizing Costs and Searching for Subsidies*, *Law & Contemp. Probs.*, Spring 1998, at 171, 186.

159. See Devins & Herz, *Uneasy Case*, *supra* note 156, at 585 (arguing agency lawyers’ in-depth knowledge of substantive issues may trump DOJ attorneys’ generalist courtroom skills).

interested] decisions,”¹⁶⁰ there is no doubt that the DOJ embraces norms and traditions that enhance the status and autonomy of the Department and its attorneys.¹⁶¹ These customs allow the Department and its attorneys to see themselves as lawyers for “the United States . . . and not [for] the particular President who happens to be serving.”¹⁶²

These norms also play an integral role in DOJ efforts to recruit top lawyers and maintain its elite status.¹⁶³ Justice Department lawyers are willing to trade off some of the income of big firm practice in favor of the rewards of public service and their expectation of an eventual move to other high status jobs, including large private sector law firms and the academy. In this way, the bureaucratic interest of the DOJ (independence from external influence) is inextricably linked to the personal interest of DOJ attorneys (associating “with law firms of high reputation”).¹⁶⁴ This is especially true of the Office of Solicitor General and Office of Legal Counsel. Alumni of these offices include four Supreme Court Justices, many federal court of appeals judges, partners in the appellate practices of the nation’s top law firms, and numerous law faculty.¹⁶⁵

To summarize: Like other bureaucracies, the Justice Department wishes to maximize autonomy; specifically, it embraces norms and traditions that shield it from outside influence and facilitate its desire to maintain its status as an elite institution. Below, we show that the DOJ’s duty to

160. McGinnis, *Principle Versus Politics*, supra note 150, at 810.

161. For quite similar reasons, the DOJ’s Office of Legal Counsel seeks a monopoly over the resolution of interagency legal disputes. See *infra* notes 200–205 and accompanying text (discussing ways in which OLC seeks to preserve its monopoly over interagency legal disputes). For a recent articulation of why the OLC should maintain such control (rather than allow the President to request multiple legal opinions from affected agencies), see Walter Dellinger, *Meanwhile, at the White House . . .*, *Slate* (June 23, 2011, 3:18 PM), www.slate.com/id/2297410/entry/2297533 (on file with the *Columbia Law Review*) (discussing President Obama’s request for multiple opinions on legality of U.S. military action in Libya).

162. Solicitors General Panel on the Legacy of the Rehnquist Court, 74 *Geo. Wash. L. Rev.* 1171, 1180 (2006) (comments of Walter E. Dellinger).

163. See Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 *Geo. Wash. L. Rev.* 1105, 1108 (1995) (arguing lawyers “invest considerable resources in reputation-building,” including working for “prestigious law firms”).

164. *Id.* at 1108; see also David E. Lewis, *The Politics of Presidential Appointments* 172–220 (2008) (suggesting high status professionals will leave government employ if they do not receive intangible, reputational benefits).

165. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 *Geo. L.J.* 1487, 1497–1501 (2008) (linking transformation of Supreme Court bar to exodus of attorneys from Office of the Solicitor General into private practice); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 *Cardozo L. Rev.* 375, 422, 424 n.185 (1993) [hereinafter McGinnis, *Opinion Function*] (noting around twenty percent of attorneys in OLC become academics and that heads of OLC are often appointed to courts of appeals and Supreme Court).

defend enhances its status by limiting political checks and, in so doing, “minimize[s] the number of rivals and constraints.”¹⁶⁶

B. *The Duty to Defend and the Office of the Solicitor General*

The duty to defend protects the Solicitor General from outside influence and bolsters the Solicitor General’s ties to the Supreme Court. The fact that the President dislikes the statute on policy grounds does not matter. The fact that affected agencies or powerful interest groups think the statute an abomination does not matter. What matters is the Solicitor General’s expert sense of Supreme Court case law. By exalting Court-centered arguments, the duty limits political actors from advancing alternative readings that further their constitutional vision. For example, during the Reagan Administration, the Solicitor General refused to make originalist arguments calling for the overturning of Warren and Burger Court-era precedents.¹⁶⁷ In this way, the duty to defend—consistent with bureaucratic theory—works to limit political interference and buoys the authority of lawyers (the Solicitor General and his career staff) whose status is tied to their expertise in, and control of, precedent-based legal arguments.¹⁶⁸

By making Court-centered arguments, moreover, the duty to defend strengthens the Solicitor General’s bond to the Supreme Court. First, the Solicitor General treats Supreme Court precedents as binding. While she has discretion to interpret these precedents, it is nonetheless true that the Solicitor General’s Court-centric arguments marginally enhance the legitimacy and authority of the Supreme Court.¹⁶⁹ Second (and relatedly), because the Solicitor General defends nearly all laws, the duties

166. Wilson, *Bureaucracy*, supra note 150, at 188.

167. See Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 64–65 (1991).

168. Fried described originalism as “almost becoming the motto of the Meese Justice Department.” *Id.* at 61. And while he never formally claims to have resisted originalist arguments to protect his turf, it is nonetheless true that political appointees in the Justice Department thought that Fried should have used originalist arguments to call for the overruling of disfavored precedent. See McGinnis, *Principle Versus Politics*, supra note 150, at 803 & n.8 (noting potential “tension between principled fidelity to the Administration’s jurisprudential views and achievement of the Administration’s policy objective in a given case”); see also Fried, supra note 167, at 40–44 (noting his efforts to prevent Meese loyalists from putting political pressure on him).

169. Lacking the powers of purse and sword, the Supreme Court relies on elected officials and the American people to accept its decisions. See generally Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Employment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 *Duke L.J.* 703, 708 (1994) (“[V]oluntary acceptance . . . [is] the only type of public acceptance . . . on which the Court formally can rely.”). For this very reason, the Court’s legitimacy is boosted by Court-centric arguments that embrace the Court as a principled, authoritative decisionmaker. See *id.* at 714–24 (discussing Court’s acceptance of legitimacy theory as explanation for why public complies with judicial directives); *id.* at 780–99 (discussing survey results furthering legitimacy theory).

leave it to the Supreme Court to have the last word on the meaning of the Constitution and the Court's precedents. Indeed, one of the Justice Department's principal arguments in favor of the duties to enforce and defend is the idea that Supreme Court resolution of constitutional disputes is an integral feature of our system of checks and balances.¹⁷⁰ Third, in the majority of cases in which she refuses to defend a federal statute, the Solicitor General reaffirms the correctness of Supreme Court rulings.¹⁷¹ The Solicitor General thereby steers clear of near-certain defeats and reinforces her special status before the Court.

The duty to defend does not stand alone. The Solicitor General embraces several customs designed both to insulate her from political control and to bolster her relationship with the Supreme Court. The Solicitor General is not interested simply in winning but in being seen as "an 'honest broker' or 'straight shooter.'"¹⁷² For example, in determining whether to seek certiorari and what position to advance in litigation, the Solicitor General makes use of a court-like process in which affected agencies submit written analyses and participate in meetings in which they "advocate" their position to the Solicitor General.¹⁷³ By employing a formal, transparent process, the Solicitor General elevates her status (by acting as "judge" on interagency disputes) and insulates herself from direct lobbying by affected agencies and other interest groups.¹⁷⁴ Moreover, the Solicitor General engages in self-abnegating behaviors that cut against Department of Justice victories before lower federal courts. These include supporting petitions for certiorari in cases in which the government won, the disclosure of adverse facts and authority, and, most notably, confessions of error (where the Solicitor General concludes that the government's lower court victory "appears to be a miscarriage of law or justice").¹⁷⁵ In cases involving the defense of federal statutes, the Solicitor General often shares with the Court alternative legal theories that cut against her principal argument.¹⁷⁶

These practices both strengthen the Solicitor General's status before the Court and bolster claims that the Solicitor General can "ascertain[] and promot[e] the interests of the United States" by maintaining her monopoly over Supreme Court litigation.¹⁷⁷ For some, these practices speak to the fact that the Solicitor General is independent of the executive

170. See *supra* notes 63, 73–74 and accompanying text.

171. See *infra* notes 267–275 (documenting that most instances where Solicitor General does not defend are straightforward applications of Supreme Court precedent).

172. Thomas W. Merrill, High-Level, "Tenured" Lawyers, *Law & Contemp. Probs.*, Spring 1998, at 83, 97.

173. Waxman, *Defending*, *supra* note 15, at 1076–77.

174. *Id.* at 1076.

175. Merrill, *supra* note 172, at 96–98.

176. See Waxman, *Defending*, *supra* note 15, at 1081–82 (highlighting cases in which Solicitor General made arguments both for and against constitutionality of legislation).

177. Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 *Ind. L.J.* 1297, 1313 (2000).

branch, an office that has no client but, instead, has obligations to the Supreme Court, to the United States, and to justice.¹⁷⁸ Career attorneys, in particular, embrace the self-abnegating behavior of the office and, with it, the office's independence from the White House and its special relationship with the Court.¹⁷⁹ For others, these practices bolster the Solicitor General's credibility before the Court—so that the Solicitor General is a more effective lawyer for the executive branch precisely because she is more than simply an advocate for the legal policy preferences of the executive branch.¹⁸⁰

Under either scenario (and consistent with bureaucratic theory), the Solicitor General's office acts in ways that enhance its autonomy and status.¹⁸¹ For example, by making sure that the views of independent agencies are shared with the Court, the Solicitor General cannot be accused of squelching their voice. In so doing, there is less risk of the independent agencies acquiring formal legislative authorization to present their views.¹⁸² By acting in ways that reflect a "sense of obligation to the Court

178. For a sampling of these views (from Attorneys General and Solicitors General), see Francis Biddle, *In Brief Authority* 97–98 (1962) (noting Solicitor General's sole client is the United States and expounding on freedom of office); Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* 17 (1987) (repeating Solicitor General Frederick Lehman: "The United States wins its point whenever justice is done its citizens in the courts"); Simone E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 *A.B.A. J.* 229, 229–30 (1955) (noting Solicitor General's "chief business is not to achieve victory but to establish justice").

179. See Merrill, *supra* note 172, at 97 ("Virtually every exercise of self-abnegating behavior originates with civil service employees—the Assistants to the Solicitor General or the career deputies.").

180. For a sampling of this perspective (from Solicitors General and academics who once worked in the Office of Solicitor General), see Rex E. Lee, *Lawying for the Government: Politics, Polemics and Principle*, 47 *Ohio St. L.J.* 595, 597, 601 (1986) (describing "reservoir of credibility," established over time, "on which the incumbent Solicitor General may draw to his immediate adversarial advantage"); Theodore B. Olson, *The Advocate as Friend: The Solicitor General's Stewardship Through the Example of Rex E. Lee*, 2003 *BYU L. Rev.* 3, 13 ("[S]uccess in realizing the president's overall litigation objectives ultimately depended on [the Solicitor General] preserving [his office's] special relationship with the Court."); Merrill, *supra* note 172, at 99 ("[I]t may be that tenured lawyers are . . . more likely to be steadfast in defense of the presidency than political appointees will be."); David A. Strauss, *The Solicitor General and the Interests of the United States*, *Law & Contemp. Probs.*, Winter & Spring 1998, at 165, 172–73 ("The Office will function best . . . when it seems to the Court that it is seeing the same, familiar Solicitor General's Office in every case—preferably, the same . . . Office that it saw when the other political party was in power.").

181. By way of contrast, political appointees outside the Solicitor General's office have argued that the Solicitor General should see herself as an advocate for the President's agenda and, consequently, should be subject to greater political controls. See McGinnis, *Principle Versus Politics*, *supra* note 150, at 800–08. For an excellent discussion of different conceptions of the Solicitor General's role in government, see generally Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 *Loy. L.A. L. Rev.* 1105 (1988).

182. See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 *Calif. L. Rev.* 255, 271–72 (1994) [hereinafter Devins,

and to the constitutional system” and distinguish her from “lawyers for private interests,” the Solicitor General elevates her status above all other advocates.¹⁸³ No other advocate can claim the lofty title of “Tenth Justice.”¹⁸⁴

For its part, the Supreme Court reinforces these practices and rewards the Solicitor General’s fealty to the Court. It grants around seventy percent of the certiorari petitions filed by the Solicitor General.¹⁸⁵ It rules in favor of the Solicitor more than seventy percent of the time (in cases in which the government is a party).¹⁸⁶ The Justices frequently (around twenty-two times a year) ask the Solicitor General’s Office to share its views on whether to grant certiorari in cases in which the government is not a party.¹⁸⁷ As a result, the Solicitor General now appears as party or (more typically) amicus in around three-fourths of all cases.¹⁸⁸ The Court, moreover, backs centralization of litigation authority, noting that the Solicitor General has a “broader view of litigation” than the “more parochial view” of individual agencies and, consequently that the government “is apt to fare better if [litigation] decisions are concentrated in a single official.”¹⁸⁹

Supreme Court support of Solicitor General control of government litigation, along with its general backing, strengthens the Solicitor General’s status and helps fend off efforts to limit her power. This gives the Solicitor General a powerful reason to embrace the duty to defend and other norms that link her special relationship with the Court to her independence, her ability to present herself as something other than an advocate for the President.

At the same time, for reasons we detail later, the Solicitor General cannot fully insulate herself from the White House. To accommodate oc-

Unitariness] (discussing Congress’s grant of Supreme Court litigation authority to Federal Trade Commission (FTC), a decision precipitated by conflicts between FTC and DOJ Antitrust Division).

183. Letter from Robert H. Bork, Solicitor Gen., to Simon Lazarus III (Aug. 5, 1975), *in* Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong. 500–01 (1975).

184. Caplan, *supra* note 178, at 3.

185. Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* 25 (1992); see also Lazarus, *supra* note 165, at 1493 (estimating Court grants Solicitor General’s certiorari petitions “about 70% of the time compared to less than 3–4% for others”).

186. See Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 Fla. St. U. L. Rev. 391, 422 tbl.1 (2000) (tabulating Supreme Court outcomes by federal government’s posture in case).

187. See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General’s Changing Role in Supreme Court Litigation*, 51 B.C. L. Rev. 1323, 1372 n.247 (2010) (“During the Roberts Court, the justices have called for the views of the Solicitor General an average of twenty-two times per Term, up from about fifteen times per Term during the latter Rehnquist Court.”); see also *id.* at 1334 n.51 (citing studies finding Court follows Solicitor General’s recommendations around eighty percent of the time).

188. *Id.* at 1353–60.

189. *Fed. Election Comm’n v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994).

casional White House pressure, the duties to enforce and defend are riddled with exceptions.¹⁹⁰ Consequently the duties are only marginally helpful in staving-off efforts by the White House and others to dictate the content of Solicitor General filings.

C. *The Office of Legal Counsel and the Duty to Defend*

When it comes to the duty to defend, the Solicitor General has a potential rival in the Justice Department—the Office of Legal Counsel. Although the OLC plays no formal role in litigation, it functions as the government’s chief watchdog on issues that implicate presidential power. The OLC helps determine whether the government should claim executive privilege; helps the White House assess the scope of presidential power on war making and other issues; prepares constitutional analyses of legislation and, in so doing, facilitates the President’s power to independently interpret the Constitution (including the drafting of constitutionally based veto messages or signing statements); and facilitates the President’s faithful execution of the laws by resolving interagency legal disputes.¹⁹¹ Like the Solicitor General, the OLC has strong incentives to protect its authority from rival agencies and, in so doing, enhance its power and status in government.¹⁹² And like the Solicitor General, the Office of Legal Counsel often pursues this goal by embracing neutral-sounding principles that ostensibly limit its discretion and, in so doing, insulate it from other governmental actors.¹⁹³

Unlike the Solicitor General, however, the Office of Legal Counsel does not enhance its status by embracing principles that transfer decisionmaking power away from the President and to the courts. Instead, OLC power is hinged to the presidency and, as such, there is no apparent benefit to the OLC when the President’s power to interpret the Constitution is limited in order to facilitate judicial resolution of a legal

190. For instance, the “presidential powers” exception to the duty to defend enables the Solicitor General to both protect her turf and respond to political pressures from the White House and advocates of presidential power inside the DOJ. See *infra* notes 240–243 and accompanying text (describing congressional respect for assertion of presidential powers exception).

191. See generally Douglas W. Kmiec, *The Attorney General’s Lawyer: Inside the Meese Justice Department* (1992) (discussing personal experiences of Reagan OLC head Douglas Kmiec); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 *Colum. L. Rev.* 1448 (2010) (providing descriptive and normative examination of role of stare decisis in OLC); Symposium, *Executive Branch Interpretation of the Law*, 15 *Cardozo L. Rev.* 21, 337–524 (1993) (presenting papers focused on function of OLC).

192. See McGinnis, *Opinion Function*, *supra* note 165, at 425–31 (“The tension between preserving the [OLC’s] reputation and providing advice that is consonant with the administration’s objectives is central to understanding how OLC conducts its assignments.”).

193. See *infra* notes 204–212 and accompanying text (discussing OLC adherence to its precedent and its use of adjudicatory model for resolving interagency disputes).

dispute (via execution of laws the President thinks unconstitutional and the Solicitor General's defense of such laws).¹⁹⁴

In the abstract, at least, the OLC seems a rival of sorts to the Solicitor General. Rather than endorse the duties to enforce and defend, the OLC presumably would embrace the idea that the President neither has to enforce nor defend laws that he thinks unconstitutional. This rivalry, as it turns out, is largely ethereal. Again bureaucratic theory explains why. Like the Solicitor General, the OLC endeavors to maximize its status and authority within boundaries set by other political actors. With respect to the duty to defend, the Solicitor General embraces exceptions to the duty that are responsive to core OLC interests in protecting the President's role in our system of separation of powers.¹⁹⁵ Outside of statutes limiting presidential prerogatives,¹⁹⁶ the OLC, as Part I details, generally supports presidential enforcement—even enforcement of statutes the President is unwilling to defend in court.¹⁹⁷ This position allows the OLC to take into account political limits on presidential nonenforcement and operates as a neutral-sounding principle that simultaneously limits OLC discretion and maintains its high status.¹⁹⁸ Attorneys in the OLC, both careerists and their political supervisors, wish to maintain the OLC's reputation as being above politics, in part, because their future career prospects are tied to it.¹⁹⁹

194. The OLC's mission, in large part, is "to assert and maintain the legitimate powers and privileges of the President" and, as such, the "separation of powers does seem to be regarded as the soul of that office's work." The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 126 (1996); Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. Rev. 17, 39 (1995) [hereinafter Lund, *Lawyers*].

195. In making this point, we do not mean to suggest that the attorneys in the Office of the Solicitor General do not personally believe in the exception governing refusals to defend federal statutes that implicate presidential power. Our point is simply that there is no actual rivalry between the OLC and the Solicitor General on this question.

196. See Recommendation that the Dep't of Justice Not Defend the Constitutionality of Certain Provisions of the Bankr. Amendments and Fed. Judgeship Act of 1984, 8 Op. O.L.C. 183, 194–95 (1984) (opining that President has no duty to enforce statutes that limit presidential power).

197. See *supra* notes 60–66 and accompanying text (describing OLC support of presidential enforcement). At the same time, the OLC recognizes that the President has inherent power not to enforce and, on rare occasion, it is appropriate for him to make use of this power. See *The Att'y Gen.'s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 43 Op. Att'y Gen. 275, 279–80 (1980) ("[I]n rare cases the Executive's duty to the constitutional system may require that a statute be challenged."). For an inventory of OLC declarations on presidential nonenforcement, see Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. Rev. 1559, 1594 n.141 (2007).

198. See *infra* notes 199–203 and accompanying text.

199. Most notably, by arguing that Presidents should generally enforce laws that they think unconstitutional, the OLC looks to courts to settle disputes over the constitutionality of federal legislation. In so doing, the OLC embraces court-centric norms that insulate the office from political attack and enhance the personal status of OLC attorneys. This is not to say that OLC lawyers do not personally believe in these norms; OLC attorneys may

In understanding OLC practices, the starting point is the office's reputation for "principled legal analysis"—a reputation built on its independence from political controls and its corresponding ability to recruit top attorneys.²⁰⁰ Because the OLC settles interagency legal disputes and advises the White House on the scope of presidential power, "the primary threats to OLC's credibility and integrity are likely to be its own clients—the White House, the Attorney General, and the various departments and agencies that seek its advice."²⁰¹ If the OLC was seen as simply following White House orders, disappointed agencies would seek White House reversals;²⁰² likewise, OLC separation of powers decisions would seem more like the "whim of individuals than the command of impersonal laws."²⁰³

When resolving interagency legal disputes, the OLC imposes both procedural and substantive constraints on its decisionmaking. Procedural constraints include the OLC's refusal to respond to agency queries about matters in litigation, its insistence that agencies seeking legal opinions supply their own opinion on the matter in question, its utilization of an "adjudicatory" model in which the OLC reviews, and relies solely on, submissions by both sides of an interagency dispute (and in which OLC lawyers refuse to meet with lawyers or policymakers from other agencies), and the eventual publication of the OLC opinion resolving the dispute.²⁰⁴ By acting like a court and imposing these procedural constraints, the OLC acquires its "reputation for legally principled opinions."²⁰⁵

OLC adherence to its own precedent is a substantive constraint that likewise limits its discretion, protects it from external interference, and enhances its status and reputation.²⁰⁶ Like judicial *stare decisis*, adherence to precedent enhances the OLC's status as a legal, not political, ac-

temper their belief in presidential review by recognizing the need for judicial resolution of constitutional disputes.

200. McGinnis, *Opinion Function*, *supra* note 165, at 424.

201. Morrison, *supra* note 191, at 1496–97.

202. See McGinnis, *Opinion Function*, *supra* note 165, at 423 ("Insofar as OLC maintains an outstanding reputation for principled legal advice, agencies are more likely to accept OLC's resolutions as final . . .").

203. Jack Goldsmith, *The Terror Presidency* 146 (2007).

204. This process is detailed in McGinnis, *Opinion Function*, *supra* note 165, at 426–29.

205. *Id.* at 429; see also Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 *Cardozo L. Rev.* 437, 495 (1993) (describing OLC's "tendencies towards quasi-judicial decision making" as "self-serving").

206. See Morrison, *supra* note 191, at 1494 (arguing standard *stare decisis* values such as consistency and predictability in law, efficiency of decisionmaking, and credibility of decisionmaker apply to OLC); see also Harold Honju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 *Cardozo L. Rev.* 513, 514 (1993) (stating OLC has developed norms that "protect its legal judgments from the winds of political pressure and expediency that buffet its executive branch clients"); Mark Tushnet, *Non-Judicial Review*, 40 *Harv. J. on Legis.* 453, 473 (2003) ("The OLC has good strategic reasons for being reasonably disinterested.").

tor.²⁰⁷ Moreover, adherence to precedent shields the OLC from political attack. “[B]y providing a robust basis for saying ‘no’ to [agencies and other] clients,” adherence to precedent “helps safeguard OLC’s credibility and integrity.”²⁰⁸ At the same time, adherence to precedent limits but does not foreclose OLC efforts to advance its (or the White House’s) legal policy agenda; the OLC may creatively interpret and occasionally overrule precedent.²⁰⁹

What then of OLC opinions on the President’s duties to enforce and defend laws? Outside of separation of powers cases, the OLC views presidential enforcement as critical to teeing up a judicial resolution of potential constitutional challenges to legislation.²¹⁰ For this very reason, the OLC—drawing a distinction between the duties to enforce and defend—backed President Clinton’s decision to enforce but not defend 1996 legislation requiring discharge from the military of all HIV-positive service members.²¹¹ Perhaps more striking, even in the separation of powers context, the OLC makes court-centric arguments to explain why the President need neither enforce nor defend, by arguing that sometimes the only way to create a case or controversy in these disputes is for the President *not* to enforce.²¹²

This embrace of court-centric arguments about the duty to enforce but not defend is superficially counterintuitive but eminently sensible. While the OLC ostensibly limits presidential power, it does so in ways that take into account its own interests as well as the respective needs of the Congress, the President, and court-centric interests within the Department of Justice. Congress is strongly interested in having its laws enforced and having the courts resolve any constitutional uncertainties

207. Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864–68 (1992) (suggesting overruling of controversial precedent undermines Supreme Court’s institutional legitimacy).

208. Morrison, *supra* note 191, at 1497.

209. See *id.* at 1484–88 (finding both general adherence to precedent and increasing willingness of OLC—since advent of Clinton administration—to distinguish or overrule precedent). In this way, adherence to precedent—like the duty to defend—is a neutral device that allows for exceptions.

210. For an inventory of cases in which the President enforced but did not defend federal law, see Letter from Andrew Fois, Assistant Att’y Gen. to the Hon. Orrin G. Hatch, Chairman, Comm. on the Judiciary, U.S. Senate, *supra* note 65, at 3–7.

211. See Jack Quinn, Counsel to the President & Walter Dellinger, Assistant Att’y Gen., White House Press Briefing (Feb. 9, 1996), available at <http://archives.clintonpresidentialcenter.org/?u=020996-press-briefing-by-quinn-and-dellinger-on-hiv-provision.htm> (on file with the *Columbia Law Review*). For additional discussion, see *supra* notes 64–65 and accompanying text. Arguments in support of President Obama’s decision to enforce but not defend the DOMA likewise point to the need for a definitive court ruling on the statute’s constitutionality. See *supra* notes 66–69 and accompanying text.

212. According to a 1994 OLC opinion: “[A] policy of consistent Presidential enforcement of statutes limiting his power would deny the Supreme Court the opportunity to review the limitations” Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994).

about them;²¹³ the President is generally more interested in peaceful relations with Congress, the media, and affected agencies than in abstract constitutional questions.²¹⁴ By embracing a duty to enforce but not defend, the President can have his cake and eat it too—he can curry favor with interest groups and others in his coalition by arguing in court that a disfavored law is unconstitutional, and he can avoid political reprisals by interest group and lawmaker opponents by enforcing a law he thinks unconstitutional. The Solicitor General and other court-centric offices in the Justice Department are interested in strengthening their relationship with the courts as well as their own statuses and authorities—things tied to the power of courts adjudicating constitutional disputes.²¹⁵ And finally, the OLC benefits: The separation of powers exception to the duty to enforce honors presidential prerogatives; the fact that the OLC otherwise rhetorically embraces a duty to enforce facilitates the OLC's reputation as being above politics and, perhaps more important, generally protects the OLC from politically damaging battles over presidential nonenforcement (where the President would often feel compelled to enforce and, if need be, disregard OLC nonenforcement recommendations). Moreover, by embracing a duty to enforce that looks to courts to settle the constitutionality of federal legislation, OLC attorneys enhance their personal reputations.²¹⁶ In sum, the OLC—consistent with bureaucratic theory—protects its status and reputation by walking a tightrope between political accountability and its interests in defending presidential power.²¹⁷

D. *Congress, the President, and the Duty to Defend*

As noted above, DOJ support for the duties to enforce and defend is also tied to its incentives to simultaneously maintain good relations with Congress and the White House. Congress can pressure the DOJ via legislation shifting litigation authority, the power of the purse, and the power to investigate.²¹⁸ The President can not only redistribute litigation au-

213. See *infra* notes 220–223 and accompanying text.

214. For an excellent treatment of how it is that the White House trades off its abstract commitment to the separation of powers in order to pursue more immediate, more tangible policy goals, see generally Lund, *Lawyers*, *supra* note 194.

215. See *supra* Part III.B and accompanying text (discussing Solicitor General's interest in duty to defend).

216. In particular, by embracing court-centric norms, OLC attorneys and their supervisors improve their chances of leaving the OLC for high status jobs at places that largely embrace court-centric norms—federal judgeships, the legal academy, and elite law firms. See *supra* notes 163–165 and accompanying text.

217. See *supra* notes 150–152 and accompanying text (discussing need for agencies to take political constraints into account).

218. For a discussion of legislative grants of independent litigation authority, see Devins, *Unitariness*, *supra* note 182, at 269–80. For a discussion of Roosevelt Administration efforts to centralize litigation authority in the DOJ, see Neal Devins, *Government Lawyers and the New Deal*, 96 *Colum. L. Rev.* 237, 256–61 (1996) [hereinafter Devins, *New Deal*] (reviewing William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995)).

thority within the executive branch; he can threaten removal, thereby causing DOJ officials to toe the White House line.²¹⁹

The DOJ, as bureaucratic theory predicts, must take these risks into account—maximizing its autonomy and status while also operating within boundaries set by political actors. By embracing malleable duties to enforce and defend, the DOJ does just this. The duties to enforce and defend meet the needs of Congress and the White House, thereby shielding the Department from these political actors as well as agency rivals (who seek independent litigation authority).

1. *Congress.* — By enforcing and defending the vast majority of federal statutes (even those that the President disapproves of), the DOJ bolsters its relationship with Congress and shields itself from possible lawmaker challenges to DOJ litigation authority. This is not because lawmakers are interested in abstract questions of the balance of power between Congress, the President, and the Courts.²²⁰ Lawmakers, instead, are interested in individual litigation disputes that speak to their or their party's policy agenda.²²¹ Congressional support of the duties to enforce and defend is largely tied to the fact that DOJ practices generally do not undermine the legal policy preferences of any lawmaker—whether they personally support or oppose the statute subject to constitutional challenge. Lawmakers who back these statutes expect that they will be defended in court. The duties meet their needs: The DOJ will almost always defend the law; and even if the DOJ does not defend the law, the President will enforce it to facilitate judicial resolution of the legal dispute. Lawmakers who do not support the law likewise expect that their views will be presented in court. They, however, do not expect the executive to block enforcement of the law or the DOJ to refuse to defend the law.²²² In part, the duties to enforce and defend operate as a norm that shields the Department from such pressure. In part, lawmakers see politi-

219. See McGinnis, *Opinion Function*, *supra* note 165, at 430 (discussing Nixon White House efforts to push DOJ to back presidential impoundment authority). In addition to direct White House intervention, the Attorney General may pursue the President's legal policy agenda by overruling either the OLC or the Solicitor General. See Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 *Ky. L.J.* 485, 494–95 (1994–1995) [hereinafter *Days, Characters*] (discussing Attorney General's power over Solicitor General).

220. See Louis Fisher, *Congressional Abdication on War and Spending* 162–63 (2000) (tracking declining lawmaker interest in protecting core institutional prerogatives); William G. Howell, *Power Without Persuasion* 101–02 (2003) (detailing how presidents expand power at expense of Congress); Moe & Howell, *supra* note 148, at 144 (explaining why lawmakers trade off institutional power of Congress in favor of interests—voters, political parties—that control their reelection and their status in Congress).

221. See generally Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 *Nw. U. L. Rev.* 737 [hereinafter, Devins, *Party Polarization*] (documenting how party polarization contributes to lawmakers trading off their institutional responsibilities in favor of partisan party objectives).

222. For a discussion of episodes in which Congress pressured DOJ to either enforce or defend laws, see *infra* notes 232–238 and accompanying text.

cal costs in arguing that the executive should preclude judicial challenges to federal law by refusing to enforce them.²²³

Consider, for example, Congress's response to the Obama Administration's decision to enforce but not defend the DOMA. Four lawmakers commented on the President's action on either the House or Senate floor. Of these four, only one lawmaker (House Republican James Lankford) criticized the President based on the erroneous belief that he had "unilaterally decide[d] not to enforce the Defense of Marriage Act."²²⁴ The other three lawmakers (House Democrat Jerry Nadler and Senate Democrats Diane Feinstein and Patrick Leahy) praised the President for his decision to enforce but not defend the DOMA.²²⁵ Likewise, Senate Democrat Kristin Gillibrand praised the President (noting that the "executive branch's responsibility to defend federal laws is not absolute") in a letter calling on the House Republican leadership to abandon its defense of the DOMA.²²⁶

While DOMA opponents might have supported the President had he refused to enforce the statute, it is telling that no lawmaker called for the President to back up his view that the DOMA is unconstitutional by refusing to enforce the statute. This may reflect institutional norms that Presidents should not unilaterally settle constitutional challenges to federal statutes. It may also reflect the fact that today's Congress is polarized along party lines and, consequently, lawmakers from the President's party will almost always support the President.²²⁷ Whatever the explanation, lawmakers from both parties acquiesce to the President's enforcement of federal law—even those laws that his DOJ will not defend in court.

With the notable exception of Watergate-era legislation establishing an Office of Senate Legal Counsel to defend congressional interests in separation of powers disputes and requiring the DOJ to notify that office

223. See Devins, Party Polarization, *supra* note 221, at 759–62 (discussing increasing lawmaker support for judicial resolution of constitutional questions).

224. 157 Cong. Rec. H1400 (daily ed. Mar. 1, 2011) (remarks of Rep. James Lankford).

225. *Id.* at H1642 (daily ed. Mar. 9, 2011) (remarks of Rep. Jerrold Nadler) ("President Obama is enforcing the law. He is simply not urging it in court. That's his prerogative, and that's his duty if he doesn't think it's constitutional."); *id.* at S1754 (daily ed. Mar. 16, 2011) (remarks of Sen. Patrick Leahy) ("I applaud President Obama and Attorney General Holder for making the right decision."); *cf. id.* (remarks of Sen. Dianne Feinstein) (noting President's conclusion "that the law violates fundamental constitutional guarantees of equal protection").

226. Letter from Sen. Kirsten Gillibrand to John Boehner, Speaker of the House of Representatives (March 2, 2011), available at <http://gillibrand.senate.gov/newsroom/press/release/gillibrand-to-house-gop-dont-spend-taxpayer-money-defending-unconstitutional-doma-law> (on file with the *Columbia Law Review*).

227. See Neal Devins, Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives, 45 *Willamette L. Rev.* 395, 410 (2009) ("When Congress is polarized, members of the President's party are not likely to break ranks and vote to limit presidential initiatives.").

when it would not defend federal statutes,²²⁸ Congress has generally steered clear of DOJ enforcement/defense of federal statutes.²²⁹ Outside of confirmation hearings (where Attorney General and Solicitor General nominees are asked about their willingness to defend statutes at odds with either their own or the President's agenda),²³⁰ we could only locate three post-1978 episodes where lawmakers took meaningful aim at the DOJ's failure to enforce or defend federal statutes.²³¹ In 1985, House

228. 2 U.S.C. § 288e(a) (2006) allows the Senate Legal Counsel, when authorized by the Senate, to appear in any legal action "in which the powers and responsibilities of Congress under the Constitution . . . are placed in issue." See *Days, Characters*, supra note 219, at 501–03 (discussing these statutory measures as well as Congress's failure to enact legislation creating a congressional general counsel who would represent congressional interests in court). For additional discussion, see Charles Tiefer, *The Senate and House Counsel Office: Dilemmas in Representing in Court the Institutional Congressional Client*, *Law & Contemp. Probs.*, Spring 1998, at 47, 47–48.

229. That is not to say that lawmakers never express their views on issues of DOJ representation. Congress, for example, has held hearings about Clinton DOJ arguments in religious liberty cases and about White House and interest group efforts to pressure the Reagan Office of Solicitor General to advance the President's legal policy agenda on abortion, affirmative action, and other issues. See Department of Justice Oversight, *Hearing on the Activities of the Department of Justice Before the S. Comm. on the Judiciary*, 103d Cong. 3–4, 26–28 (1994) (statement of Sen. Orrin Hatch) (challenging Clinton Administration's interpretation of Religious Freedom Act); Solicitor General's Office: Hearing before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary, 100th Cong., 2 (1987) (statement of Rep. Don Edwards) (noting charge that "essential intellectual independence of the [Solicitor General's] Office is being compromised . . . has been made on a number of occasions during the past several years"). On occasion, moreover, Congress grants litigation authority outside the Justice Department—typically to independent agencies. See Devins, *Unitariness*, supra note 182, at 263–80 (chronicling legislative grants of independent litigating authority). For the most part, however, lawmakers have little interest in overseeing the DOJ's near-monopoly on executive branch litigation. See Neal Devins & Michael Herz, *The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, *Law & Contemp. Probs.*, Winter 1998, at 205, 206 (arguing "distribution of litigation authority among executive branch agencies and departments is of marginal consequence to Congress").

230. Here is a sampling of lawmaker efforts to jawbone either the Attorney General designee or Solicitor General designee to defend federal statutes supported by that lawmaker: 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 Sen. John Ashcroft, Att'y Gen. nominee) (discussing willingness to defend prospective legislation that he opposed); 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. 125–33 (2001) (statement of Theodore B. Olson) (discussing duty to defend in general and campaign finance laws in particular); Nomination of Seth Waxman to be Solicitor General, Hearing before the S. Comm. on the Judiciary, 105th Cong. 98–102 (1997) (statement of Seth Waxman) (discussing willingness to defend restrictions on habeas corpus, *Miranda*-override legislation, and Religious Freedom Restoration Act).

231. In addition to these three episodes, lawmakers have asked the DOJ to provide Congress with information (typically through a letter) about DOJ claims that it can refuse to defend a federal statute. See Letter from Andrew Fois, Assistant Att'y Gen., to the Hon. Orrin G. Hatch, Chairman, Comm. on the Judiciary, U.S. Senate, supra note 65

Democrats and Senate Republicans registered their disapproval of an OLC opinion advising executive agencies to neither enforce nor defend a federal contracting law.²³² Lawmakers vehemently opposed the President's refusal to implement the law by holding numerous hearings, issuing committee reports, and threatening to cut off executive branch procurement funds.²³³ In 1993, Clinton Solicitor General Drew Days reversed the position of the Bush I Administration by refusing to defend a 1984 child pornography statute in a case before the Supreme Court, arguing that the statute was unconstitutional and that the conviction of Stephen Knox for possession of child pornography should be vacated.²³⁴ Congress struck back; all one hundred senators voted for a resolution condemning the Solicitor General's brief and a 1994 crime bill included a section expressing Congress's support for the 1984 law.²³⁵ In 1999, Senate Republicans held hearings to examine the DOJ's refusal to en-

(responding to February 21, 1996 letter from Hatch regarding Department of Justice decision to enforce but not defend federal legislation requiring dismissal of HIV-positive members from military service); Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275 (1980) (reprinting July 30, 1980 letter from Attorney General Benjamin Civiletti to Senator Max Baucus, Chairman of Senate Subcommittee on Limitations of Contracted and Delegated Authority, responding to request for information regarding Carter Justice Department decision not to defend speech limitations in Public Broadcasting Act of 1967). The Reagan DOJ rejected this conclusion and did defend the Broadcasting Act. See Ira L. Strauber, *Neglected Policies: Constitutional Law and Legal Commentary as Civic Education* 72 (2002) (describing Administration's decision to defend). For additional discussion see *infra* notes 267–269 and accompanying text (providing examples of DOJ's refusal to defend federal statutes).

232. See Office of Legal Counsel, Dept. of Justice Memorandum on the Constitutionality of the Bid Protest Provisions in CICA, 42 Fed. Cont. Rep. (BNA) 755 (1984) (expressing DOJ opinion that law posed serious constitutional problems).

233. The law allowed disappointed bidders to lodge protests with a government official outside the executive branch, the Comptroller General. In so doing, the OLC claimed that the law impermissibly vested executive power in the Comptroller General. For descriptions of this dispute, see Kmiec, *supra* note 191, at 54 (describing OLC's examination of law and determination of its unconstitutionality); Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 *Geo. Wash. L. Rev.* 401, 418–21 (1989) (describing executive nonenforcement and congressional response). For a detailing of lawmaker objections, see House Comm. on Gov't Operations, *The President's Suspension of the Competition in Contracting Act Is Unconstitutional*, Report of the House Committee on Government Operations, H.R. Rep. No. 98-138 (1985).

234. Brief for the United States at 8–9, *Knox v. United States*, 508 U.S. 959 (1993) (No. 92-1183).

235. Violent Crimes Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 160003, 108 Stat. 1796, 2038 (codified at note appended to 18 USC § 2252 (2006)). The focus of the dispute was whether the child pornography law applied to girls dressed in scanty apparel. The George H.W. Bush Administration had successfully argued that the law applied to such photos. Clinton Solicitor General Drew Days said it did not and, after the Supreme Court agreed to hear the case, “confess[ed] error” to the Court. For Days's account of this dispute, see Drew S. Days, III, *When the President Says “No”: A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 *J. App. Prac. & Process* 509, 514–17 (2001) [hereinafter *Days, A Few Thoughts*] (describing Days's role in briefing *Knox*).

force and defend 1968 legislation that sought to statutorily nullify *Miranda v. Arizona*.²³⁶ For its part, the DOJ largely acquiesced to Congress in these disputes. It backed away from its nonenforcement/nondefense in the contracting law dispute.²³⁷ And the President and Attorney General not only disavowed the Solicitor General's confession of error in the 1993 child pornography case, the Attorney General also took control of the case and offered a defense.²³⁸

The infrequency of these episodes and the fact that Congress has not meaningfully considered the larger question of DOJ enforcement and defense of federal statutes is striking. It speaks to the facts that Congress generally accepts DOJ practices and that lawmakers are much more interested in their own reelection and the policy goals of their parties than they are in collective goods implicating "the institutional power of Congress."²³⁹ With the exception of the 1985 bid protest dispute, none of these episodes implicated broader questions of congressional power (and that dispute focused much more on the failure to enforce than the failure to defend).²⁴⁰ More generally, Congress has made clear that the President need not defend federal statutes that implicate presidential power. When creating the Office of Senate Legal Counsel, lawmakers did not question that DOJ position; their focus, instead, was on creating a mechanism by which Congress could participate in these disputes.²⁴¹

236. See The Clinton Justice Department's Refusal to Enforce the Law on Voluntary Confessions: Hearing before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 2 (1999). In addition to these hearings, lawmakers used departmental oversight hearings to ask Attorney General Reno and Solicitor General Days about the DOJ's willingness to defend *Miranda*-override legislation. See Oversight of the Department of Justice: Hearings before the S. Comm. on the Judiciary, 106th Cong. 9–11 (1999) (memorializing exchange between Senator Strom Thurmond and Attorney General Janet Reno); Solicitor General Oversight: Hearings before the S. Comm. on the Judiciary, 104th Cong. 29–33 (1995) (describing exchange between Senator Fred Thompson and Solicitor General Drew Days). After the DOJ announced that it would not defend the statute, moreover, Solicitor General Waxman was asked to explain the Administration's decision. Waxman, *Defending*, supra note 15, at 1073.

237. See Myron Struck, Meese Averts Showdown on GAO Contract Power, *Wash. Post*, June 5, 1985, at A21. In litigation regarding this provision, the Solicitor General—in the wake of congressional amendments to the contested provisions—abandoned his challenge to the statute's constitutionality. See Miller, supra note 233, at 420.

238. See Stuart Taylor Jr., Demagoging Kidporn: Justice Gets Bad Rap, *Legal Times*, Nov. 29, 1993, at 26 (quoting Clinton letter); Pierre Thomas, Reno Takes Tougher Stance on Child Pornography, *Wash. Post*, Nov. 11, 1994, at A3 (reporting Attorney General "overruled [Solicitor General] and took the somewhat unusual position of signing the brief herself"). By overriding the Solicitor General, the Attorney General took personal control of the litigation—so that the DOJ formally defended the 1984 statute. For additional discussion, see Days, *A Few Thoughts*, supra note 235, at 514–17.

239. Moe & Howell, supra note 148, at 144.

240. See supra notes 232–233 and accompanying text (describing congressional opposition to executive refusal to enforce or defend federal contracting law).

241. The Senate Legal Counsel is required to "defend vigorously" the constitutionality of federal legislation. 2 U.S.C. § 288h (2006). Hearings and floor statements about the creation of this office did not question the propriety of the DOJ's refusal to defend

More generally, lawmakers are accepting of presidential decisions to enforce but not defend federal statutes.²⁴² What matters is that the statute will be defended in court—not that the DOJ defends the law. This helps explain why lawmakers vehemently resisted Clinton DOJ efforts to short circuit Supreme Court resolution of a constitutional challenge to a federal antipornography statute but acquiesced to President Obama’s decision to enforce but not defend DOMA.²⁴³

Though Congress possesses significant weapons to curb the DOJ, it has placed few constraints on DOJ autonomy. Ironically, the constraints that Congress does impose on the DOJ largely inure to the latter’s benefit. In particular, by calling on the DOJ to either enforce or defend federal laws, Congress embraces the very court-centric norms that enhance the autonomy and status of the DOJ. At the same time, by hardly ever resisting the DOJ’s refusal to defend, Congress cedes the Solicitor General the latitude to both be an advocate for presidential power and to advance the President’s constitutional vision.

2. *The White House.* — The White House gains much and loses little by having the DOJ defend nearly all federal statutes that do not implicate presidential power. By signaling that the DOJ generally will advance congressional preferences, the duty to defend furthers White House interests. First, the duty helps preserve DOJ control of government litigation, something the White House strongly favors. Second, general adherence

perceived encroachments on presidential power. Instead, lawmakers acknowledged a “conflict of interest” between the DOJ and Congress. See, e.g., 123 Cong. Rec. 2961–65 (1977) (statement of Sen. Abourezk) (calling for creation of Office of Senate Counsel, in part to address legitimate conflict of interest between DOJ and Congress on presidential power disputes).

242. In the post-1978 period, we could identify only two cases in which the executive refused to enforce or defend federal statutes (outside the separation of powers context). In both of these cases, there was no legislative support for the statutory provision in question and, indeed, there is reason to think that both of these provisions were mistakenly included in the legislation. In both cases, the executive’s announcement that it would neither enforce nor defend met no congressional opposition. In 1996, Congress included a provision in a telecommunications law that seemingly made internet communications concerning abortion a felony. Telecommunications Act of 1996, Pub. L. No. 104-104, § 507(a), 110 Stat. 56, 137 (codified as amended at 18 U.S.C. § 1462 (2006)). The inclusion of this provision, apparently, was an error; its author, Henry Hyde, attributed it to “bad staff work” and claimed that nothing in his amendment should be “interpreted to inhibit free speech about the topic of abortion.” John Schwartz, *Abortion Issue Makes Its Way into Telecom Law*, Seattle Times, Feb. 9, 1996, at A3.

In 1997, Congress enacted a law that held attorneys criminally liable for helping elderly citizens qualify for Medicaid by transferring property. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 251, 522–23 (codified at 42 U.S.C. § 1320a-7b(a)(6) (2006)). According to a law review account, “[t]he fact that there was no advocate for its passage, no legislative history, no hearings, no reports, no comments, and no discussion of its merits lends credence to the inference that it may have been a legislative oversight.” Jim Wayne Chidress, *Medicaid and Estate Recovery Issues*, 1 *Appalachian J.L.* 75, 83 (2002).

243. Compare *supra* notes 224–227 and accompanying text (discussing reaction to Obama decision), with *supra* notes 235–238 and accompanying text (detailing reaction to Clinton decision).

to the duties to enforce and defend symbolizes the President's willingness to operate within boundaries that some believe arise from our system of checks and balances,²⁴⁴ insulating him from charges that he is imperial. Third, generally honoring the duties helps to legitimize those rare instances where the President decides not to enforce or defend.²⁴⁵ As compared to these benefits, the costs are minimal. Exceptions to the duty to defend provide sufficient flexibility to accommodate the limited constitutional agenda of Presidents, meaning that the duties are not terribly constraining in practice.

To start, Presidents strongly back DOJ centralization of litigation and, consequently, support practices—like the duty to defend—that shield the DOJ from rivals who would otherwise seek to have Congress decentralize litigation authority. Consider, for example, Franklin Delano Roosevelt's efforts to centralize litigation authority in the DOJ and thus strengthen his hold on the burgeoning administrative state.²⁴⁶

By backing the court-centric duties to enforce and defend, moreover, the President facilitates DOJ efforts to bolster its special relationship with the Supreme Court. The President typically benefits from this relationship because he and his Solicitor General generally will see eye-to-eye on constitutional issues.²⁴⁷ Through the President's power to appoint, it is likely that the Solicitor General will have views generally simpatico with the White House. Reagan Solicitor General Charles Fried put it this way: "I was chosen as Solicitor General not because the President had a view and a policy about all of the detailed and technical matters I would have to deal with, but because [my views were in sync with his] general disposition about the law"²⁴⁸

Presidential acquiescence to the duties to enforce and defend is also a byproduct of the fact that there are next-to-no cases where adherence to the duties undermines the President's constitutional agenda.²⁴⁹ Although

244. See *supra* notes 61–69 and accompanying text (discussing views of Clinton and Obama Administrations).

245. See McGinnis, *Opinion Function*, *supra* note 165, at 424 (noting President wants his "legal views to have force" and perceived politicization of DOJ might result in the "discount[ing]" of those views). For examples of the President participating in Supreme Court litigation, see *infra* notes 251–252 and accompanying text (discussing involvement of Presidents Reagan, Bush, and Clinton).

246. Devins, *New Deal*, *supra* note 218, at 256–61.

247. For a sampling of arguments linking Solicitor General independence to Solicitor General advocacy on behalf of the President, see *supra* note 180; see also *infra* note 248 and accompanying text (citing Reagan Solicitor General Charles Fried as example).

248. Fried, *supra* note 167, at 191.

249. Indeed, Presidents generally support judicial supremacy—either because Court rulings match presidential preferences or (when Court rulings are at odds with his preferences) because the President may need to reach out to lawmakers, voters, and other constituencies that support the Court. This is the central point of Keith E. Whittington, *The Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* 284 (2007) ("Hemmed in by conflicting commitments and demands, presidents have ceded ground to the justices.").

Presidents have a general interest in presidential power and may have specific interests on issues like abortion, affirmative action, and gay rights, they rarely have strong feelings about most constitutional disputes.²⁵⁰ Outside of a handful of high-visibility cases, the White House leaves it to the Solicitor General and Attorney General to manage the President's legal policy agenda. Instances where the White House either communicates its legal policy preferences to the DOJ or otherwise participates in the drafting of Supreme Court filings are few and far between.²⁵¹ Instances where the President personally intervenes and orders the DOJ to reverse its position are extremely rare and highly visible. Examples in-

250. Even when Presidents have staked out a legal policy position, it is often the case that that principle is honored more in the breach than in the observance. For example, as Nelson Lund documents, while the first Bush Administration made “the defense of the presidency” a priority, it also regularly traded off this priority to pursue more “immediate and tangible” policy goals. Lund, *Lawyers*, supra note 194, at 35. In a separation of powers dispute involving the Metropolitan Washington Airports Authority, the administration did not challenge federal legislation that transferred operating control and financial responsibility for Washington area airports away from the Department of Transportation and to a newly created entity whose board of review “would be members of Congress appointed by the new state operating authority from a list of names submitted by the congressional leadership.” *Id.* at 71. Perhaps more striking, the administration never challenged Congress's power to authorize qui tam actions—lawsuits by private “attorneys general” who receive a cash bounty for enforcing federal laws. See Ara Lovitt, Note, *Fighting for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 *Stan. L. Rev.* 853, 863–64 (1997) (discussing relative silence of executive branch on qui tam suits). This episode was especially striking because the Solicitor General and the White House largely ignored a Bush Office of Legal Counsel opinion strongly challenging the constitutionality of qui tams. See *id.* at 863 (arguing OLC memo “did not represent the government's official litigating position”).

251. In his essay *When the President Says “No”: A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, Clinton Solicitor General Drew Days discusses instances where the Reagan, George H.W. Bush, and (first term) Clinton White Houses sought to influence Solicitor General filings. Days, *A Few Thoughts*, supra note 235, at 520 (concluding direct Presidential intervention is “so notable” because of its rarity). Days is able to identify five cases, only one of which directly involved the duty to defend. *Id.* at 510–19 (identifying *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Comm’n Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Knox v. United States*, 510 U.S. 939 (1993); *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996)). Other prominent examples include *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Truman), *Brown v. Board of Education*, 347 U.S. 483 (1954) (Eisenhower), *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Nixon), *Buckley v. Valeo*, 424 U.S. 1 (1976) (Ford), *INS v. Chadha*, 462 U.S. 919 (1983) (Reagan), and *Grutter v. Bollinger*, 539 U.S. 306 (2003) (George W. Bush). See Joseph A. Califano, *Governing America* 231–43 (1981) (discussing *Bakke*); William French Smith, *Law and Justice in the Reagan Administration* 218–21 (1991) (discussing *Chadha*); Devins, *Unitariness*, supra note 182, at 284–85 (discussing *Shelley*, *Brown*, and *New York Times*); Howard Fineman & Tamara Lipper, *Spinning Race*, *Newsweek*, Jan. 27, 2003, available at <http://www.newsweek.com/id/62910> (on file with the *Columbia Law Review*) (discussing *Grutter*). Of these six cases, two involved the separation of powers exception to the duty to defend (*Buckley* and *Chadha*). No doubt, there are more examples. At the same time, the fact that there are next-to-no documented examples of direct White House participation is telling.

clude Reagan's intervention in a lawsuit involving tax breaks for racially discriminatory schools, George H.W. Bush's participation in a dispute over the desegregation of traditionally black colleges, and Clinton's involvement in a lawsuit involving federal enforcement of the Religious Freedom Restoration Act.²⁵²

By highlighting the infrequency of presidential communications and interventions, we do not mean to suggest that the DOJ is a near-perfect mirror of the President's legal agenda. Likewise, the fact that Presidents generally have not sought to override DOJ decisions to defend federal statutes does not mean that Presidents embraces these defenses.²⁵³ Our point, instead, is that the duty to defend rarely implicates issues on which the President has strong personal feelings. Rather than pick fights with Congress or interest groups over the nondefense of federal statutes, the President is more interested in placating Congress and protecting DOJ control of litigation and the Solicitor General's special relationship with the Supreme Court. Indeed, the only presidential interventions in duty to defend cases involve cases where the President disapproves of either the Solicitor General's refusal to defend a federal statute or its failure to defend as vigorously as the President would like.²⁵⁴

Finally, the President benefits from the duties to enforce and defend in other, less visible ways. By insulating the DOJ from presidential control, the duty to defend allows the President to seek cover behind a DOJ

252. In all three cases (none of which directly involves the defense of federal legislation), the President had been directly lobbied by interest groups of congressional leadership. See Caplan, *supra* note 178, at 56 (discussing influential House Republican Trent Lott's lobbying of President Reagan in tax breaks case); Days, *A Few Thoughts*, *supra* note 235, at 518 (discussing Clinton's decision—after meeting with religious interest groups—to have DOJ argue religious liberty interests were infringed upon in case where DOJ had previously argued there was no substantial burden on religion); Lund, *Lawyers*, *supra* note 194, at 76 n.171 (noting George H.W. Bush's decision on traditionally black colleges followed in wake of his meeting with "representatives of interests materially affected"); Linda Greenhouse, *Bush Reverses U.S. Stance Against Black College Aid*, *N.Y. Times*, Oct. 22, 1991, at B6 (discussing President George H.W. Bush's response to leading black educators).

253. See Lund, *Lawyers*, *supra* note 194, at 70–79 (noting disjunction between George H.W. Bush Administration's embrace of presidential power and DOJ litigation strategy in Airports dispute, discussed *supra* note 250); see also *supra* note 250 (discussing George H.W. Bush's defense of federal *qui tam* statute).

254. See Department of Justice Oversight, *Hearing on the Activities of the Department of Justice Before the S. Comm. on the Judiciary*, 103d Cong. 11 (1994) (statement of Solicitor Gen. Drew S. Days) (discussing Clinton's ordering Solicitor General to more vigorously enforce Religious Freedom Restoration Act (RFRA)); *supra* notes 235–238 and accompanying text (discussing President Clinton's disapproval of Solicitor General's confession of error in *Knox*, a 1994 child pornography case). In expressing disapproval of Solicitor General decisionmaking in these cases, the President responded to lawmaker pressure (in the child pornography case) and interest group pressure (in the RFRA case). See *supra* notes 235–238 (discussing child pornography case); *supra* note 252 (discussing RFRA case). In other words, Presidents may trade off the presidential power to independently interpret the Constitution for more immediate political rewards. In Part V, we consider this question.

that largely agrees with him. The President can claim that DOJ independence legitimizes its support for Presidential legal claims. Correspondingly by signaling his willingness to be bound by DOJ interpretations of the Constitution and Supreme Court precedent, the duties to enforce and defend help combat allegations of presidential imperialism.

At the same time, as we discuss in Part IV, exceptions to the duty to defend generally allow for a meshing of a President's constitutional vision and the DOJ's purported responsibility to defend federal statutes. There is no duty in separation of powers cases;²⁵⁵ likewise, there is no duty in cases where the DOJ claims that the statute is at odds with Supreme Court precedent.

IV. THE DUTY TO DEFEND IN PRACTICE: HOW THE SOLICITOR GENERAL FITFULLY ADVANCES THE PRESIDENT'S CONSTITUTIONAL VISION VIA EXCEPTIONS TO THE DUTY TO DEFEND

Throughout this Article, we cast doubt on the constitutionality and efficacy of the so-called duty to defend. Part I identifies dramatic differences in approaches from administration to administration—so much so that it is impossible to articulate the precise contours of the duty. New configurations pop up as the need arises. Part II argues that the court-centric duty to defend has no place in our constitutional scheme. The President need not subordinate himself to the judiciary's sense of the Constitution. Part II also casts doubt on the many exceptions to the duty to defend, such as the convenient but suspect presidential powers exception. Part III offers an alternative explanation for the duty, namely, the self-interest of the DOJ. The duty to defend is a classic example of an agency embracing neutral principles that shield it from political attack and maximize its status.

This Part tests the claims of Part III. By examining instances where the DOJ refuses to defend federal statutes, we show that the duty is implemented in ways that speak more to DOJ self-interest than to the President's supposed obligation to defend laws he thinks unconstitutional.²⁵⁶ In particular, as Part III suggests, the DOJ implements the duty

255. This does not mean that the DOJ will always challenge statutes that limit presidential prerogatives. See *supra* note 250 (discussing Airports dispute and *qui tam* cases).

256. While we think our proof is conclusive, we recognize the limits of our methodology. In particular, by paying attention to instances where the DOJ does not defend federal statutes, we make no effort to identify cases in which the DOJ and/or President thinks a law unconstitutional but nevertheless defends it. There are two reasons we do not consider such cases. First, one would have to identify the President's constitutional agenda, a difficult task, and whether the President or even the Solicitor General was aware that the statute ran afoul of that agenda, a near-impossible endeavor. Second, even if the President is personally aware of the case and even if the DOJ thinks that the statute is clearly unconstitutional, the DOJ may defend the statute for political reasons. For example, there is reason to question Clinton Solicitor General Seth Waxman's account of his decision to defend Communications Decency Act (CDA) provisions that

to defend in ways that simultaneously (1) embrace a court-centric focus that strengthens ties between the courts and the DOJ; (2) allow it to take an assertive view of presidential power in separation of powers cases; and (3) outside of separation of powers cases, allow significant wiggle room so the President and the DOJ can advance their limited constitutional agendas.²⁵⁷

More than anything, our discussion highlights the breadth of the exceptions to the duty to defend. Without these exceptions, the duty to defend would have been abandoned long ago, for political reasons. The Obama Administration's recasting of the duty to defend in the DOMA case highlights the need for the DOJ to provide the President with sufficient discretion to advance his limited constitutional vision.²⁵⁸ As the balance of this Part shows, this recasting typifies DOJ practices: The DOJ speaks of the duty to defend to justify decisions that serve its self-interest, typically to explain why its failure to defend a law fits within one or another exception to the duty.

Modern DOJ statements about the duty to defend typically recognize two exceptions. One exception is in cases that implicate presidential

imposed criminal penalties on "indecent" speech available to children on the internet. See Waxman, *Defending*, supra note 15, at 1079 (arguing DOJ's brief articulated "the strongest possible rationale in support of constitutionality"). For Waxman, his CDA defense, while an "example some people chuckle to recall," exemplifies the willingness of the Solicitor General to defend constitutionally suspect statutes. *Id.* Yet there is reason to think that Waxman defended the CDA not because he believed reasonable arguments could be made in its defense but, in large part, because Congress and the Clinton White House had rebuked Solicitor General Drew Days for failing to defend a child pornography statute in the *Knox* case. See supra notes 234–238 and accompanying text. For additional discussion, see Neal Devins, *Politics and Principle: An Alternative Take on Seth P. Waxman's Defending Congress*, 81 N.C. L. Rev. 2061, 2066–67 (2003) [hereinafter Devins, *Alternative Take*] (arguing Waxman may have defended CDA to avoid political backlash).

257. In this Part, the analysis is limited to evidence that the duty to defend is implemented in ways that allow the DOJ and the President to advance their constitutional agendas. This Article does not analyze the President's implementation of the duty to enforce and, with it, the interface of the two duties. The reason for this is that there is simply no way to catalog instances where the President does not enforce a law or to isolate instances where constitutional concerns figure into the President's calculation. First, executive agencies have finite budgets and cannot implement all enacted legislation. Hence, the failure to enforce could result from resource allocation decisions rather than be grounded in the Constitution. For example, Attorney General Holder claimed that "scarce enforcement resources" explained his decision to end raids on distributors of medical marijuana. David Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensers*, N.Y. Times, Mar. 18, 2009, at A20. Second, unlike the duty to defend, there is no regular mechanism by which the President alerts Congress of instances in which he will not enforce laws for constitutional reasons. Obviously, the absence of such reporting makes an examination of nonenforcement on constitutional grounds much more difficult.

258. See supra notes 66–70 and accompanying text (discussing Obama Attorney General Holder's recasting of the duty); see also infra notes 293–301 (discussing internal contradictions in Obama Administration regarding DOMA announcement).

power.²⁵⁹ The second exception is court-centric, focusing on instances where the federal statute is sharply at odds with Supreme Court jurisprudence.²⁶⁰ Under the DOJ's standard account, the Solicitor General would not refuse to defend a statute merely because the President's constitutional jurisprudence could not be squared with the statute. Yet this standard account is untrue: In addition to the two generally recognized exceptions, there is a third exception, namely, instances where either the White House or the DOJ does not wish to defend the constitutionality of legislation. With the possible exception of Attorney General Holder's letter on the DOMA, the DOJ does not formally recognize this exception.²⁶¹ Instead, if it says anything at all, it struggles to fit those cases into the exception for clearly unconstitutional legislation.

From December 1975 to May 2011, according to an inventory of communications from the DOJ to Congress regarding the defense of federal statutes,²⁶² the DOJ sent one hundred and six communications to Congress, ninety-six of which concerned its refusal to defend federal statutes.²⁶³ These ninety-six communications (because some statutory provisions are the subject of more than one communication) concerned seventy-five different statutory provisions. Fourteen of these provisions implicate the separation of powers exception;²⁶⁴ the remaining sixty-one arguably fit into the clearly unconstitutional exception to the duty. Of these sixty-one, seven received substantial news coverage.²⁶⁵ We are aware of two other cases, omitted from the DOJ list, which implicated the duty to defend and received substantial news coverage.²⁶⁶ We focus on these

259. See *supra* notes 195–197 and accompanying text (discussing presidential power exception).

260. See Waxman, *Defending*, *supra* note 15, at 1084–87 (discussing court-focused exception).

261. See *supra* Part I (discussing duty and its variants). For additional discussion of the DOMA letter, see *infra* notes 293–301 and accompanying text (highlighting how duty to defend obfuscates more than illuminates President's constitutional vision).

262. This inventory is maintained by the Senate Legal Counsel. See Communications and Memoranda on the Defense of Acts of Congress [hereinafter Senate List] (on file with the *Columbia Law Review*).

263. See Memorandum from Brian Kelley to Neal Devins (July 7, 2011) [hereinafter Kelley Memo] (on file with the *Columbia Law Review*) (summarizing and categorizing communications between DOJ and Congress).

264. Most cases in which the DOJ invoked the separation of powers exception were highly visible. Ten of these fourteen cases received substantial press treatment, including the independent counsel statute, the Gramm-Rudman Deficit Control Act, and the Competition in Contracting Act. *Id.*; see also *supra* notes 232–233, 237 and accompanying text (discussing congressional opposition to President's refusal to enforce Competition in Contracting Act).

265. In identifying cases that received major news coverage, our research assistant Brian Kelley did a variety of keyword searches using the LexisNexis "Major Newspapers" database. See Kelley Memo, *supra* note 263.

266. These cases are *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and *Knox v. United States*, 510 U.S. 939 (1993). For an explanation of why these cases were not included on the list, see *infra* notes 279, 291.

nine cases. These high-visibility cases are more likely to draw attention from lawmakers, are more likely to trigger White House interest, and, as such, are more likely to implicate the executive's constitutional vision.

Before turning to these nine cases, here is a snapshot of the fifty-two under-the-radar nonseparation-of-powers cases: For the most part, they involve legal challenges to statutes whose constitutionality had been called into question by a Supreme Court ruling about the same provision, a related provision, or an analogous statutory provision. Here are two examples: After the Supreme Court's 1975 invalidation of a gender-based classification in the Social Security Act, the Solicitor General refused to defend ongoing challenges to the same statutory provision.²⁶⁷ Similarly, in 1999, after the Supreme Court ruled that Congress cannot abrogate state sovereign immunity by permitting private damage awards for violation of patent laws,²⁶⁸ the Solicitor General refused to defend an analogous abrogation provision in federal copyright law.²⁶⁹

These and similar cases are clear instances where the Solicitor General sees little to be gained from defending a federal statute that clearly runs against Supreme Court precedent, typically recent decisions (so there is virtually no chance of the Supreme Court reversing course). As discussed in Part III, the Solicitor General embraces Court-centric norms in refusing to defend such statutes because she has a general interest in winning and also wishes to bolster her bond to the Court.²⁷⁰

What of the nine high-profile refusals to defend?²⁷¹ Was Supreme Court precedent equally clear or, alternatively, were these instances where the DOJ is putting its legal policy agenda ahead of its obligation to defend federal statutes? Two were clearly unconstitutional provisions that Congress apparently included in the statutes by mistake; the President refused to either enforce or defend and no member of Congress ob-

267. In *Weinberger v. Wiesenfeld*, the Court invalidated section 202 of the Social Security Act which provided some death and disability benefits to widows but not widowers. 420 U.S. 636, 653 (1975). Following that ruling, the Solicitor General understandably refused to defend section 202 in six other cases. See Senate List, *supra* note 262 (describing DOJ communications with Congress regarding its refusal to defend certain statutes); see also Wade H. McCree, Jr., *The Solicitor General and His Clients*, 59 Wash. U. L.Q. 337, 344 (1981) (describing Solicitor General's actions after *Weinberger* and subsequent Congressional response).

268. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999).

269. See Waxman, *Defending*, *supra* note 15, at 1086 (discussing decision not to defend abortion provision in copyright law).

270. Moreover, as we discuss, the refusal to defend such statutes is not at odds with the President's interest in allocating scarce executive branch resources. See *infra* Part V (noting President need not pursue losing arguments before Supreme Court).

271. With the exception of the Ford and George W. Bush administrations, every other administration during the 1975–2011 period was involved in at least one of these nine cases. See *infra* notes 272–293 and accompanying text (discussing high-profile duty to defend cases).

jected.²⁷² Another was a statute that the DOJ defended but declined to appeal an adverse judgment to the Supreme Court (arguably to press an alternative defense of the statute in the district court).²⁷³ With respect to four statutes, the DOJ flip-flopped, either refusing to defend and then defending or vice-versa. Finally, the DOJ refused to defend before the Supreme Court two statutes upheld as constitutional by a federal court of appeals.

STATUTES THE EXECUTIVE BRANCH DECLINED TO DEFEND²⁷⁴

Case Name	Statutory Provision at Issue	Administration	Reason for refusal	Did refusal deviate from judicial decisions or the practices of this or other administrations?
Sanger v. Reno, 966 F. Supp. 151 (E.D.N.Y. 1997)	18 U.S.C. § 1462(c) (1994) (criminalizing Internet provisions concerning abortion)	Clinton	Clearly unconstitutional.	No.
N.Y. State Bar Ass'n. v. Reno, 999 F. Supp. 710 (N.D.N.Y. 1998)	42 U.S.C. § 1320a-7b(a) (6) (1994) (holding attorneys criminally liable for helping elderly qualify for Medicaid by transferring property)	Clinton	Clearly unconstitutional.	No.

272. See *supra* note 242 (discussing addition of abortion provision to Telecommunications Act of 1996 and addition of attorney liability provision to Medicaid statute).

273. The statute in question is the now-repealed Don't Ask, Don't Tell [DADT] ban on military service members found to be gay. See Jess Bravin & Laura Meckler, *Obama Avoids Test on Gays in Military*, *Wall St. J.*, May 19, 2009, at A3. Significantly, even after the repeal of the statute but before the Department of Defense had implemented that repeal, the Obama administration continued to defend Don't Ask, Don't Tell. See Jennifer Epstein, *Fed Court: End 'Don't Ask' Now*, *Politico* (July 6, 2011, 4:09 PM), <http://www.politico.com/news/stories/0711/58439.html> (on file with the *Columbia Law Review*).

274. While eight of these cases involved a clear refusal to defend, the history of *Witt v. Department of Air Force* is more complex. See 444 F. Supp. 2d 1138 (W.D. Wash. 2006), *aff'd* in part, *rev'd* in part, 527 F.3d 806 (9th Cir. 2008). The Bush Administration initially chose to defend the DADT policy. *Witt*, 444 F. Supp. 2d at 1141. Although President Obama urged the repeal of DADT, the Administration continued to defend the statute. Defendants' Opposition to Plaintiff's Motion for Summary Judgment at 1 n.1, *Witt*, 739 F. Supp. 2d 1308 (No. C06-5195), 2010 WL 3921974. After the Ninth Circuit remanded, see *Witt*, 527 F.3d 806, the Obama Administration declined to seek certiorari from the Supreme Court. The choice to accept the remand may have been intended as a weak form of the refusal to defend. See Jackie Gardina, *Let the Small Changes Begin: President*

<p>Witt v. Dep't of Air Force, 444 F. Supp. 2d 1138 (W.D. Wash. 2006), aff'd in part, rev'd in part, 527 F.3d 806 (9th Cir. 2008), remanded to 739 F. Supp. 2d 1308 (W.D. Wash. 2010)</p>	<p>10 U.S.C. § 654 (2006) (Don't Ask, Don't Tell restrictions on gays in the military)</p>	<p>Obama</p>	<p>Decision to press an alternative defense in district court.</p>	<p>Obama Administration said it would defend statute in subsequent cases.</p>
<p>Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), aff'g Winter Park Commc'ns, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989), rev'g Shurberg Broad. of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989)</p>	<p>Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979; 47 U.S.C. § 309(i) (1988) (awarding diversity preferences in the granting of broadcasting licenses)</p>	<p>George H.W. Bush</p>	<p>Administration thought statute unconstitutional.</p>	<p>Yes. Statute upheld by Winter Park Commc'ns, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989).</p>
<p>United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), rev'd 530 U.S. 428 (2000)</p>	<p>18 U.S.C. § 3501 (1994) (statutorily overruling <i>Miranda</i> rule)</p>	<p>Clinton</p>	<p>Would require Supreme Court reversal of precedent.</p>	<p>Yes, at Supreme Court. Statute had been upheld in United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999).</p>
<p>League of Women Voters v. FCC, 547 F. Supp. 379 (C.D. Cal. 1982), aff'd, 468 U.S. 364 (1984)</p>	<p>47 U.S.C. § 399 (1978) (limitations on editorializing by public broadcasting stations)</p>	<p>Carter</p>	<p>Administration thought statute unconstitutional.</p>	<p>Yes. Reagan Administration would defend.</p>
<p>Turner Broad. Sys. v. FCC, 819 F. Supp. 32 (D.D.C. 1993), judgment vacated 512 U.S. 622 (1994), remanded to 910 F. Supp. 734 (D.D.C. 1995), aff'd 520 U.S. 180 (1997)</p>	<p>47 U.S.C. §§ 534, 535 (1994) (mandating that cable companies "must carry" some locally licensed television stations)</p>	<p>George H.W. Bush</p>	<p>President had vetoed bill on constitutional grounds.</p>	<p>Yes. Clinton Administration would defend.</p>

Obama, Executive Power, and "Don't Ask Don't Tell," 18 B.U. Pub. Int. L.J. 237, 254 (2009) (suggesting "the decision [to not seek certiorari] is helpful politically . . . sends a positive message to opponents of [DADT] . . . [and] preserv[es] the First and Ninth Circuits' favorable readings of *Lawrence*.").

United States v. Knox, 776 F. Supp. 174 (M.D. Pa. 1991), aff'd 977 F.2d 815 (3d Cir. 1992), judgment vacated 510 U.S. 939 (1993), remanded to 32 F.3d 733 (3d Cir. 1994)	18 U.S.C. § 2252(a)(2), (4) (1988) (criminalizing possession of "lascivious exhibition or [a minor's] genital or pubic area")	Clinton	Statute unconstitutional.	Yes. George H.W. Bush Administration defended; Clinton administration reversed position and eventually defended.
Pedersen v. Office of Pers. Mgmt., No. 3:10-cv-1750 (D. Conn. Nov. 9, 2010)	1 U.S.C. § 7 (2006) (Defense of Marriage Act)	Obama	No reasonable arguments.	Yes. George W. Bush would defend, and Obama would defend at start of his Administration.

It is impossible to look at these nine episodes without concluding that the DOJ sometimes compromises its duty to defend in high-visibility cases, even when no existing exception permits such compromise.²⁷⁵ Consider, for example, the two Supreme Court cases where the Solicitor General argued that federal legislation was unconstitutional in the face of federal courts of appeals decisions upholding the statute. In *Metro Broadcasting, Inc. v. FCC*, a sharply divided Supreme Court rejected the Solicitor General's claims that FCC efforts to expand broadcast diversity through race preferences were unconstitutional and, in so doing, affirmed the D.C. Circuit.²⁷⁶ There is no dispute that the Solicitor General refused to defend because of the President's stated opposition to race preferences, not because Supreme Court doctrine mandated such an outcome (a conclusion backed up by the Supreme Court's approval of the statute).²⁷⁷ There is also no dispute that the Solicitor General, recognizing potential congressional backlash to the nondefense, allowed the FCC

275. We are not the first to reach this conclusion. Clinton Solicitor General Seth Waxman (perhaps unintentionally) backs up this claim in his defense of the duty to defend. Waxman notes that he only refused to defend in cases where he would have to ask the Court to overrule past precedent; at the same time, Waxman (after referencing two of the nine cases that we have identified) notes that the DOJ has "occasionally declined to make professionally respectable arguments, even when available, to defend a statute—typically, in cases in which it is manifest that the President has concluded that the statute is unconstitutional." Waxman, *Defending*, supra note 15, at 1083.

276. 497 U.S. 547 (1990). The DOJ did not participate in the appeals court case. The FCC has independent litigation authority on some matters, including the issues raised in the *Metro Broadcasting* case. See Devins, *Unitariness*, supra note 182, at 293–96. Before the Supreme Court, however, the FCC did not have independent litigation authority. See id.

277. For a discussion of Bush administration opposition to race preferences, see Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 *Notre Dame L. Rev.* 955, 982–99 (1993).

to defend the statute before the Supreme Court.²⁷⁸ By ensuring that the Supreme Court heard conflicting arguments from two government advocates,²⁷⁹ the Solicitor General advanced his agenda while taking political reality into account.

The second case where the Solicitor General argued that a federal court of appeals wrongly upheld the constitutionality of federal legislation was *Dickerson v. United States*.²⁸⁰ Here, a lopsided Supreme Court agreed with the Solicitor General that Congress could not statutorily overrule *Miranda v. Arizona* and, in so doing, rejected the contrary conclusion of the Fourth Circuit Court of Appeals.²⁸¹ In explaining his decision not to defend the statute, Clinton Solicitor General Seth Waxman argued that *Miranda* was a constitutional decision and that the duty to defend does not apply in cases where the Solicitor General would have to ask the Supreme Court to overturn constitutional doctrine.²⁸² That view was also backed by Democratic lawmakers who had filed a brief extolling *Miranda's* "extraordinary history of acceptance and success in federal law enforcement."²⁸³ In so doing, Waxman rejected the claims of Republican lawmakers and the Fourth Circuit that *Miranda* (and subsequent

278. In particular, the White House feared that the Senate would not confirm Bush nominees to the FCC. Recognizing the volatility of FCC-Congress relations during the Reagan era, the Bush administration appointed nominees who backed diversity preferences and took steps to make sure that the DOJ would allow for a defense of these preferences (even if this defense came from the FCC and not the DOJ). See Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent*, 15 *Cardozo L. Rev.* 273, 301–04 (1993) (detailing tensions surrounding *Metro Broadcasting*).

279. Because a government advocate defended the constitutionality of diversity preferences, the DOJ did not notify Congress about its failure to defend the statute. That is why *Metro Broadcasting* is one of the two nondefense cases not on the Senate Counsel's list. See *supra* notes 262–266 and accompanying text (discussing communications from DOJ to Congress regarding defense of federal statutes).

280. 530 U.S. 428 (2000).

281. *Id.* at 431–32 ("*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress . . ."); see also *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *rev'd*, 530 U.S. 428. The DOJ never defended the constitutionality of the *Miranda*-override statute. Instead, the Fourth Circuit had sua sponte asked for briefing on this question before concluding that Congress could constitutionally nullify the *Miranda* decision. See Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering *Miranda**, 149 *U. Pa. L. Rev.* 251, 252 & n.6 (2000) ("[A]cademics and journalists alike have savaged the appellate court for sua sponte considering the 1968 statute."). Even though the DOJ refused to defend the statute, the case was not moot because the government pursued its criminal prosecution without making use of the defendant's confession. *Id.* at 254 (explaining DOJ decided "to argue that the 1968 statute was unconstitutional *but* that *Dickerson's* confession was admissible under *Miranda*"). Without a party to defend the statute, the appellate court appointed Paul Cassell (an academic who had written on the topic) to defend the statute's constitutionality. *Id.* at 252 & n.9. Before the Supreme Court, Cassell was also asked to argue the case on behalf of the government. See *id.*

282. Waxman, *Defending*, *supra* note 15, at 1087–88.

283. Brief Amicus Curiae of House Democratic Leadership in Support of Petitioner at 5, *Dickerson*, 530 U.S. 428 (No. 99-5525).

Supreme Court interpretations of it) created nonconstitutional, prophylactic rules subject to congressional alteration.²⁸⁴

We do not mean to suggest that Waxman simply chose sides in a political battle or misinterpreted Supreme Court precedent. At the same time, the refusal to defend the *Miranda*-override Act highlights the malleability of the duty to defend. There is little doubt that another Solicitor General could have sided with Act supporters and endorsed the views of the only appellate court to ever rule on the statute's constitutionality. That Solicitor General undoubtedly would have framed her decision as based on an obligation to defend federal statutes, especially statutes found constitutional by lower courts of appeal.²⁸⁵ In sum, despite the availability of plausible arguments in defense of the *Miranda*-override Act, Waxman chose not to defend it probably because the administration did not want him to defend it.

A more vivid illustration of the thinness of the duty to defend occurs in instances where the Solicitor General changes her position on the defense of a statute, not in response to a change in Supreme Court doctrine but in response to political events. There are four examples on our list. Two involve reversals in response to presidential elections (where one administration refused to defend a statute but the next administration was willing to defend); two involve decisions by one administration to reverse course. Reversals in response to presidential elections are best understood as the new administration rejecting the constitutional jurisprudence of its predecessor. The Carter DOJ concluded that federal legislation prohibiting public television and radio stations from editorializing and endorsing political candidates unconstitutionally chilled their First Amendment rights. In 1981, the Reagan Administration agreed to defend the statute, noting that the Carter DOJ had focused on "some impermissible applications" of the statute and that a "limiting construction of the language of the statute is possible."²⁸⁶ Fifteen years later, in a

284. See Brief Amicus Curiae of the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of Affirmance at 7, *Dickerson*, 530 U.S. 428 (No. 99-5525) (arguing *Miranda* created a "non-constitutional[] rule designed to 'allow the Court to avoid the constitutional issues associated with state interrogations'" (quoting *Dickerson*, 166 F.3d at 688)); Brief Amicus Curiae of Senators Orrin G. Hatch et al. Urging Affirmance at 4-5, *Dickerson*, 530 U.S. 428 (No. 99-5525) ("*Miranda* rules [are] prophylactic safeguards that are non-constitutional in nature."). For a detailing of these claims by the lawyer who argued in favor of the Act's constitutionality, see generally Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of *Miranda**, 85 Iowa L. Rev. 175 (1999).

285. When the Supreme Court heard oral arguments in *Dickerson*, the case was understood as a battle between Republicans and Democrats. Republicans disavowed *Miranda* and were committed to making all plausible arguments that the decision be abandoned; Democrats largely embraced the decision. See Devins, *Alternative Take*, supra note 256, at 2071-72 ("*Miranda* override litigation required the Clinton administration to choose sides in a contested battle.").

286. Att'y Gen.'s Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25, 26 (1981). By a 5-to-4 vote, the Supreme Court ruled the act unconstitutional in *FCC v.*

case involving the constitutionality of legislation mandating that cable television providers “must carry” certain stations, the Clinton DOJ reversed the position of the Bush I Administration. President Bush thought the laws unconstitutional, vetoed it on those grounds, and refused to defend it after Congress overrode his veto.²⁸⁷ President Clinton disagreed and directed his DOJ to defend the statute.²⁸⁸

In neither of these cases did the incoming administration claim that it was acting pursuant to some intervening legal development. In neither case did the new administration claim that a predecessor had misread Supreme Court rulings on the First Amendment. Applying a different litmus test, the Reagan administration concluded that it could defend a law that had some permissible applications.²⁸⁹ The Clinton Administration simply disagreed with the constitutional views of the George H.W. Bush Administration, never asserting that the latter had misunderstood the supposed duty to defend. Again, the duty did not apply when it ran against the executive’s constitutional preferences.

Cases where one administration reverses itself likewise highlight the ease in which the DOJ can manipulate the duty to defend. We have already discussed one of these cases, *Knox v. United States*.²⁹⁰ Here, the Clinton DOJ initially reversed the Bush DOJ, concluding that a child pornography statute was overbroad on First Amendment grounds.²⁹¹ After expressions of outrage from Congress and the President, the Department flipped again.²⁹² This conduct cannot be squared with standard conceptions of the duty to defend.

League of Women Voters, 468 U.S. 364 (1984). For additional details, see Devins, *Unitariness*, supra note 182, at 293–94 (detailing tumultuous history of *FCC v. League of Women Voters*).

287. See Letter from Andrew Fois, Assistant Att’y Gen., to the Hon. Orrin G. Hatch, Chairman, Comm. on the Judiciary, U.S. Senate, supra note 65, at 6 (discussing DOJ’s decision not to defend “consistent with President Bush’s veto message to Congress”).

288. Waxman, *Defending*, supra note 15, at 1084. By a 5-to-4 vote, the Supreme Court upheld the act in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

289. Within the Carter administration, the Office of Legal Counsel had urged that the administration defend the statute for precisely this reason. See Note, *Executive Discretion*, supra note 17, at 974–76 (“There was also a strong sentiment . . . within the Justice Department’s Office of Legal Counsel that the statute should be defended.” (footnote omitted)).

290. 508 U.S. 959 (1993); see also supra notes 234–238 and accompanying text (discussing *Knox*).

291. The Clinton DOJ’s reversal was made against the backdrop of the Supreme Court granting certiorari in the case. See *Days, A Few Thoughts*, supra note 235, at 515 (detailing Clinton DOJ’s involvement in *Knox*). Consequently, rather than notify Congress of his decision not to defend, Solicitor General Days confessed error in the case. For this reason, the *Knox* litigation was not included in the list of DOJ communications to Congress regarding its defense of federal statutes.

292. While expressing personal outrage, President Clinton did not personally order the DOJ to reverse course. See *id.* at 514–17. Not surprisingly, Attorney General Reno echoed the concern and took personal charge of the case. See *id.*

The most recent case where the DOJ reversed course is the February 2011 decision by the Obama Administration to stop defending the DOMA in ongoing litigation before the Second Circuit Court of Appeals. Part I explains how Attorney General Holder refashioned the DOJ position on the duty to defend. In particular, the Holder letter argued that the government was under no obligation to make “plausible” arguments in defense of federal statutes; its obligation extended only to “reasonable” arguments.²⁹³ Pointing to the “significant history” of discrimination against gays and the “growing scientific consensus” that sexual orientation is immutable, Holder concluded that sexual orientation classifications are subject to heightened review and that the DOJ cannot defend a law that, ultimately, is little more than a manifestation of “moral disapproval of gays and lesbians.”²⁹⁴ This change in litigation strategy seemed prompted, in part, by a desire to reevaluate executive branch policy toward the DOMA.²⁹⁵

Like our other examples, the Holder letter is proof positive that the DOJ maneuvers around the duty to defend when it needs or wants to do so. By introducing the novel distinction between plausible and reasonable arguments, the DOJ highlights that it can create provisos and exceptions and determine their scope as it suits its interests. Furthermore, rather than adopting the standard of review most favorable to the government, the DOJ argued that strict scrutiny was applicable. Indeed, the letter suggested that the DOMA was constitutional under rational basis review, noting that the Department had previously advanced “reasonable” arguments in support of it under that “permissive” standard.²⁹⁶ In other words, the Holder letter suggests that the DOJ—in cases where the Supreme Court has not articulated a standard of review—should advance its vision of the Constitution, including the possible embrace of standards of review (like strict scrutiny) that cut against governmental power. This approach seems a far cry from the duty to defend; it sounds much more like an example of interpretive independence.

At the same time, the Holder letter invoked court-centric norms in ways that limit the DOJ’s ability to clearly articulate the President’s constitutional vision. Holder claims that courts are “final arbiter[s]” of the Constitution’s meaning.²⁹⁷ That, in part, means that the executive has a duty to enforce federal statutes in order to tee up litigation disputes for the courts. It also means that the DOJ is obliged to follow court prece-

293. Holder Letter, *supra* note 1, at 5. For discussion of Holder’s recalibration of the duty to defend, see *supra* notes 69–72 and accompanying text (describing Holder’s distinction between plausible and reasonable arguments).

294. Holder Letter, *supra* note 1, at 3–4.

295. See *id.* at 2 (“[T]he President and I have concluded that . . . Section 3 of DOMA is unconstitutional.”); see also Charlie Savage, *Suits on Same-Sex Marriage May Force Administration to Take a Stand*, N.Y. Times, Jan. 29, 2011, at A14 (“Mr. Obama has signaled that his administration may be re-evaluating its stance.”).

296. Holder Letter, *supra* note 1, at 6.

297. *Id.* at 5.

dent in deciding whether a reasonable argument can be made. Hence the DOJ's willingness to challenge the DOMA hinged on the failure of the courts to enunciate what standard of review should be used in cases involving same-sex classifications.²⁹⁸

The Holder letter, ultimately, is a curious blend of presidential interpretive autonomy and the DOJ's obligations to the courts (both its need to follow appellate and Supreme Court precedent and to enforce laws to facilitate judicial solutions). The odd combination obfuscates a clear-cut presentation of the President's constitutional vision. In part, by premising its nondefense of the DOMA on the failure of either the Supreme Court or Second Circuit to establish a clear-cut standard of review for same-sex classifications, the letter spends significant time engaging in questionable legal analysis about the applicability of heightened scrutiny (the Supreme Court has twice declined to hold that discrimination against gays warrants heightened review and every circuit court that has ruled on the constitutionality of the DOMA has employed rational review).²⁹⁹ More significant, by concluding that the DOMA can be defended under rational basis review, the DOJ inexplicably fails to connect its claim that the DOMA reflects antigay animus with the inevitable extension of that claim, namely, that the DOMA irrationally discriminates against gays and lesbians.³⁰⁰ For reasons detailed in Part III, this approach preserves the Department's special relationship with the courts, and it largely shields the Department from potential congressional retaliation. The statute is still enforced, arguments for its defense are still made in court, and DOJ opposition to the statute is contingent on a judicial determination that strict review is appropriate.³⁰¹ But all these benefits for the DOJ come at the cost of obscuring and, possibly sacrificing, the President's constitutional vision.

298. *Id.* at 4. The DOMA case originated in the Second Circuit, a circuit that had not sorted out what standard of review should be utilized in same-sex cases. The letter states that the DOJ, if asked whether the law was sustainable under rational basis review, would reiterate its past view that "reasonable" arguments in support of the DOMA can be made under rational basis review. *Id.* at 5. At the same time, unless and until the Supreme Court found rational basis review to be the appropriate standard, it is likely that the DOJ would pursue its nondefense of the DOMA (so that it would likely appeal a lower court ruling that rational basis review was the appropriate standard, at least if the lower court upheld the statute).

299. See generally Winkler, *supra* note 3 (describing precedent applying rationality review to sexual orientation discrimination claims).

300. The Holder letter and subsequent judicial filings both claim that the DOMA "was motivated in substantial part by animus toward gay and lesbian individuals and their intimate relations" and therefore serves no legitimate policy objective. Defendants' Brief in Opposition to Motions to Dismiss at 23, *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. C 3:10-00257-JSW).

301. Moreover, with Democrats firmly opposed to the DOMA, there is next-to-no risk of formal Congressional retaliation. See *supra* notes 224-227 and accompanying text (discussing Congress's response to the DOMA announcement); see also *supra* note 221 and accompanying text (discussing how party polarization may limit Congress's ability to countermand the DOJ).

In cases where the DOJ or President has a strong constitutional vision seemingly at odds with the duty, the DOJ will look for ways to pursue its preferred constitutional vision while giving lip service to the duty. The separation of powers exception to the duty is a clear example of this practice as are the high-visibility cases discussed in this Part. It would have been better had the President advanced his constitutional vision in a clear and direct way in all these cases. For example, rather than claim that reasonable arguments in support of the DOMA can be made in circuits that use rational review, the DOJ should have more forcefully articulated the constitutional, animus-based objections to the DOMA, no matter the standard of review.

V. IMAGINING A WORLD WITHOUT DUTIES TO DEFEND OR ENFORCE

This Part considers the practical consequences of our proposals. The more modest reform is to do away with the duty to defend; the more sweeping reform eliminates the duty to enforce as well. Under the modest reform, the Obama Administration would enforce but not defend the DOMA. But unlike Attorney General Holder's letter (which presupposes a duty to defend and therefore attempts to explain why the duty does not apply), we would have the executive make a clear and full-throated claim that the DOMA is unconstitutional. Under our broader reform, the Obama Administration would neither enforce nor defend the DOMA.

Perhaps some suppose that in a world without duties to enforce and defend, the resulting lawlessness and imbalance amongst the branches would yield something like an elective monarch. Likewise, our more modest proposal may strike some as rather immodest. Given the DOJ's oft-expressed fealty to the duty to defend, some may assume that the President's powers would be greatly augmented even if he enforced (but did not defend) laws he believed were unconstitutional. Here we speak to those who reject our claim that the Constitution forbids the President from enforcing or defending statutes that he believes are unconstitutional and who also imagine that the President will be too dominant in a world lacking either a duty to enforce or a duty to defend.

Any concerns about our modest proposal are rather misplaced. If the President enforces statutes that he believes are unconstitutional but refuses to defend them, we fail to see how this makes the President a juggernaut. In this scenario, the President generally enforces the law, even when he believes it is unconstitutional.³⁰² When a case comes before a court, no further purpose is served by having the executive advance insin-

302. In separation of powers cases and cases involving the disbursement of appropriated funds, it is often the case that the only way to facilitate judicial review is for the President not to enforce the statute. See *supra* notes 73–74 and accompanying text (discussing option of creating a justiciable controversy while refusing to defend). Consistent with existing DOJ practices, our modest proposal would back presidential nonenforcement in these types of cases. See text accompanying *supra* note 7 (noting DOJ support for nonenforcement in separation of powers cases).

cere arguments when proponents of the law's constitutionality, most notably members of Congress, can file amicus briefs brimming with sincere ones.³⁰³ Indeed, a law's proponents are more likely to vigorously defend the statute than is the Solicitor General, who, in the course of a tepid defense of a law, might admit its constitutional infirmities.³⁰⁴ If one of the benefits of the current regime is that the courts, particularly the Supreme Court, ultimately decide the constitutionality of legislation, that benefit is no less present in an enforce-but-not-defend regime.

If we can satisfy those who insist upon a judicial check on presidential review, while still allowing the President to speak with his distinct constitutional voice, there is no plausible constitutional argument for a duty to defend. The duty to defend is a shibboleth that unnecessarily subordinates executive branch constitutional interpretations to the institutional concerns of the DOJ and thereby subverts our system of overlapping checks on unconstitutional action. Our more modest proposal is a marked improvement from a system in which the executive either defends laws it thinks unconstitutional or, alternatively, often implausibly contends that there is no reasonable constitutional argument for such laws. There is no societal benefit in maintaining the fiction that the executive has a duty to defend statutes it believes are unconstitutional.

Apprehensions about our more sweeping reform are more understandable. Yet they too are overblown. As discussed below, claims about interbranch imbalances and executive lawlessness are question-begging and shed more heat than light. Moreover, fears of presidential aggrandizement are rather overstated, for they exaggerate the changes our reform would usher. After making these points, we end with a discussion of practical questions arising from our broader reform.

Although the balance metaphor is an arresting one, predictions of imbalance are not meaningful or helpful. A need to maintain balance amongst the branches hardly means that the executive must enforce those statutes that he regards as unconstitutional. No doubt, supporters of the duties to enforce and defend fear a domineering President who would decline to enforce statutes he regards as unconstitutional, thereby eliminating the possibility of judicial review for some laws. Indeed, some

303. See Waxman, *Defending*, supra note 15, at 1084–85 (noting Congress participates in litigation when President refuses to defend); cf. Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 *Stan. L. Rev.* 907, 969–71 (2011) (discussing and criticizing Supreme Court practice of appointing amici to ensure that it hears arguments from both sides of dispute).

304. See Waxman, *Defending*, supra note 15, at 1081–83 (noting examples of Solicitor General raising constitutional doubts about laws he is defending). In the DOMA case, critics of the Obama Administration accused the DOJ of providing a lackluster defense of the statutes. See Ed Whelan, *More DOMA Sabotage by Eric Holder*, *Nat'l Rev. Online* (May 9, 2011, 11:10 AM), <http://www.nationalreview.com/bench-memos/266733/more-doma-sabotage-eric-holder-ed-whelan> (on file with the *Columbia Law Review*) (“What Holder is instead doing is another step in his two-year-long practice . . . of dishonest and irresponsible stealth measures to undermine DOMA.”).

OLC opinions argue that our system of checks and balances rests on judicial review of the constitutionality of federal legislation.³⁰⁵ But by the same token, many who favor departmentalist approaches to the Constitution are likely to believe that the status quo reflects a profound imbalance. Rather than seeing courts as the “final arbiter” of constitutional disputes, departmentalists believe that checks and balances require each branch to act on its independent sense of the Constitution.

There is no way of refereeing this dispute. Claims of balance or disequilibrium are largely a matter of opinion; in a dispute about perceptions, there is no way of “correctly” calibrating governmental power across all three branches. Consequently, even if the Constitution somehow requires a balance of power among the three branches that hardly means that our broader reform is mistaken. To the contrary, many will believe it absolutely necessary to restore a lost balance.

The claim of lawlessness assumes that when the President refuses to enforce laws he believes are unconstitutional he puts himself above the law. This claim, however, ignores the fact that the President is bound by the Constitution; he would be acting lawlessly were he to enforce and defend putative statutes that he believes are unconstitutional, just as he would be acting lawlessly if he implemented the unconstitutional schemes of his aides. The President does not act lawlessly when he ignores an unconstitutional law any more than courts do when they invoke the Constitution to ignore a federal or state statute. No one (not even the DOJ) questions President Jefferson’s decision to ignore the Sedition Act, despite the fact that many contemporaries rather clearly thought the Act was constitutional.³⁰⁶

For several practical reasons, the threat of executive aggrandizement in the duty to defend context is wildly exaggerated, and, consequently, even our more comprehensive reform will have modest and marginal effects. To begin with, Presidents are unlikely to refuse to enforce and defend scores of law because they are likely to have a limited constitutional agenda. Most Presidents do not have fully developed theories of the Constitution. They are more likely to have developed fiscal, foreign affairs, and domestic policy agendas, because these agendas are far more important to the public. Recognizing that attention to constitutional matters comes at the expense of their other agendas, Presidents are likely to refuse to enforce and defend only when they have strong constitutional views and are confident that a law is unconstitutional.

305. Att’y Gen.’s Duty to Defend & Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 55–56 (1980) (“[T]he Judicial Branch is ordinarily in a position to protect both the government and the citizenry from unconstitutional action, legislative and executive.”).

306. See Att’y Gen.’s Duty to Defend & Enforce Constitutionally Objectionable Legislation, 43 Op. Att’y Gen. 275, 279 (1980) (approvingly discussing Jefferson’s nonenforcement).

To be sure, most Presidents rely upon aides to highlight constitutional matters. Sometimes these aides will have developed constitutional perspectives. But the question is whether they will communicate their views to the President—to set in motion a chain of events that might cause the President to neither defend nor enforce a law. Keenly aware that a President has many agendas and duties, officials outside the DOJ are unlikely to raise many constitutional issues with the White House. Advisors will present constitutional questions to the President only when they have strong views and when they sense that he is persuadable. Raising concerns that are repeatedly ignored is a prescription for irrelevancy.

DOJ officials, for reasons detailed in Part III, will be reluctant to raise constitutional issues because they are bureaucratically predisposed to the duties to enforce and defend and other principles that curry favor with Congress and the Supreme Court. Hence, even if the President implemented our broad reform, there is little risk of the DOJ aggressively pushing a new constitutional agenda.

We recognize that on some matters, such as socially divisive cases (like *Miranda* and the DOMA), a President may have strong constitutional views. Forcing the executive to articulate and defend those views is far better than the unedifying status quo, one in which Presidents or their advisers make implausible claims about doctrine to justify their decisions not to enforce or defend. A forthright presentation of the executive's reading of the Constitution is much better for our system of checks and balances than the Court-centric arguments we now get. As compared to an argument premised on the questionable claim that the DOMA is clearly unconstitutional under existing Supreme Court doctrine or one that conveniently, but mysteriously, largely elides over the duty to defend, a candid argument against the constitutionality of the DOMA, one refreshingly free of the Court's confusing standards of review, would have been healthy.

Further mitigating the effect of banishing the duties to enforce and defend is the availability of judicial review in some cases. The OLC, for example, notes that the only mechanism for the courts to adjudicate the constitutionality of some statutory restrictions on presidential power is for the executive to refuse to enforce those laws.³⁰⁷ Also, with respect to a statute that disperses benefits that the executive ignores on the grounds that it is unconstitutional, the law's intended beneficiaries will be able to bring a case. Should the courts issue a judgment awarding relief, the President, as the Constitution implicitly requires, must enforce the judgment. The justiciability of some nonenforcement decisions means that the pool of instances where the President has the final word on the constitutionality of a law is smaller than one might suppose.

307. Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994) ("If the President does not . . . refus[e] to execute [unconstitutional provisions] there often will be no occasion for judicial consideration of their constitutionality . . .").

Consider also the President's nonenforcement of penal statutes. We admit that no one will have standing to challenge such nonenforcement.³⁰⁸ Yet there would be no marginal impact arising from such nonenforcement because the President already may exercise the final word on the constitutionality of penal laws. Using his pardon power, the President may pardon all those who have been punished for violating an unconstitutional penal statute. And he also may pardon those who have committed acts that might be prosecuted in the future for violations of laws that the President believes are unconstitutional. Hence, with respect to penal laws, elimination of the duties to defend or enforce does not augment the President's power in any way. The President would enjoy the same power he already enjoys, namely whether to enforce a penal statute he believes is unconstitutional.

This Part ends by returning to our understanding of the President's role in our constitutional system. Throughout our analysis, we have argued that the President cannot ignore his obligation to interpret the Constitution and act on that interpretation. Yet we are not suggesting that the President spend all his time thinking about the constitutionality of legislation. The President cannot screen every existing federal statute to make sure that he regards it as constitutional for doing this would require all of his time. The Constitution requires more of the President than a single-minded focus on its defense. Just as the courts cannot focus on constitutional cases to the exclusion of all others, so too the President cannot obsess over the Constitution. Indeed, his presidential oath not only requires a defense of the Constitution but also a faithful execution of his office, an execution that requires him, among other things, to direct the executive branch, defend the nation, steward foreign affairs, and recommend measures to Congress.

Moreover, the Constitution does not oblige the President to advance a hopeless constitutional agenda. If the lower courts disagree with the President's constitutional conclusions and repeatedly award relief to plaintiffs harmed by his nonenforcement, we do not believe that the President's oath requires him to continue to refuse to enforce that law in future situations. Most obviously, if the Supreme Court has ruled against the executive in prior cases on nonenforcement, thereby ordering the executive to abide by a statute it believes is unconstitutional, the executive is not duty-bound to continue to refuse to enforce. The duty to defend the Constitution does not require the President to be obdurate and waste resources on futile defenses of his decision not to enforce.

Similar considerations come into play when the President believes a law is constitutional and the Supreme Court does not. There is little point in the President's persistently trying to enforce and defend a statute that

308. There would be no standing because sometimes nonenforcement will not injure anyone within the meaning of existing standing doctrine. See *supra* note 49 and accompanying text.

the courts predictably will refuse to honor on the grounds that it is unconstitutional. Again, the President's oath does not oblige him to mount a futile defense of his constitutional vision, when his resources (time, money, personnel) could be far better expended satisfying his other constitutional obligations.³⁰⁹

Our broader reform, ultimately, is not at all revolutionary. As we have tried to make clear, to judge its true impact one should not focus on the total number of laws that the President might refuse to enforce. Rather one should compare the number of instances where the President would have the final word on constitutionality under our broader reform to the number of instances where the President currently has (or could have if he chose) the final constitutional word. We are confident that the difference will be marginal. Our broader proposal must be understood against the backdrop of a President's necessarily limited constitutional agenda, his need to satisfy other duties and agendas, his existing ability to serve as the ultimate arbiter of the constitutionality of penal laws, his ability to employ (or create new) capacious exceptions to the duty to enforce and defend, the bureaucratic incentives of the DOJ to enforce and defend nearly all federal statutes, and the availability of judicial review with respect to some decisions not to enforce.

CONCLUSION

The duty to defend is a bureaucratic stratagem masquerading as high-sounding duty. Modern officials in the Department of Justice have fashioned numerous exceptions—the most important being the presidential powers exception—and invoked or altered them, as it suited their immediate needs. There is little continuity other than that the duty gets cast aside whenever there is sufficient pressure or need to do so. On top of all this, the duty serves no constitutional purpose, for once a case is before a court, others may defend the law even when the executive will not. The duty to defend does nothing more than occasionally subordinate and obscure the President's constitutional philosophy in service of the parochial self-interest of the DOJ.

The duty to enforce is somewhat more defensible because it helps satisfy those who insist upon judicial resolution of constitutional disputes. But it too is without strong constitutional foundation. The Constitution creates a system of reinforcing and overlapping defenses, many of which rest on independent interpretation of the Constitution. Subordination of the executive to Congress or the courts undermines that system of constitutional checks and balances. Moreover, the Constitution forbids the President from executing, and coming to the defense of, schemes he re-

309. For this reason, our proposal will not impact on the Solicitor General's refusal to defend laws clearly at odds with settled Supreme Court precedent. See *supra* notes 267–270 and accompanying text (discussing refusal to defend laws contrary to such precedent).

guards as unconstitutional, even when they come from Congress. DOJ arguments about the need to enforce unconstitutional laws so that the courts may check executive interpretations merely serve the DOJ's narrow interests.

Those opposed to the elimination of the duty to enforce exaggerate the resulting changes. The President has a limited constitutional agenda and his subordinates are unlikely to push him to refuse to enforce and defend laws on constitutional grounds, meaning the President will rarely not enforce. Moreover, the availability of judicial review in some non-enforcement cases will limit the instances where the President has the final word on constitutionality. Finally, via the pardon power, the President already has the final word on the constitutionality of many laws for he may refuse to enforce penal laws on the grounds that they are unconstitutional.

Ours is a project meant to advance earnest and independent constitutional interpretation, a modest, yet still significant, improvement over a regime that creates an atmosphere that makes it more difficult for the President to further his constitutional agenda and, on occasion, encourages executive duplicity about laws being clearly unconstitutional. We do not believe that either of our reforms will cure the common cold or feed the hungry. But we do believe that either would strengthen constitutional discourse in the political branches, temper judicial arrogance, and restore the Constitution's vision of three equal branches, each responsible for reaching its own conclusions and acting upon them in defense of the Constitution.