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The Law: Defending Congress's Interests in Court: How Lawmakers and the President Bargain over Department of Justice Representation

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In understanding the willingness of government lawyers to defend the constitutionality of federal statutes, this article will explain why presidents rarely make use of their powers under the Constitution (allowing the president to refuse to defend laws he finds unconstitutional) and under federal law (placing the control of most government litigation with the attorney general). Attention will be paid both to how Department of Justice lawyers enhance their power by defending federal statutes and to how Congress, if need be, can pressure the department to bow to lawmaker preferences. In consequence, when the president refuses to defend a statute, courts have little reason to disregard article III constraints to resolve constitutional challenges to federal laws.

This article is a preliminary attempt to sort out two questions central to the smooth workings of our tripartite system of government: first, do government lawyers have a "duty to defend" acts of Congress? Second, if it turns out that the White House refuses to defend Congress's handiwork, do lawmakers have the necessary resources and incentives to see to it that Congress's interests, ultimately, will be represented in court? The answer to the first question is a qualified no; the answer to the second question is a qualified yes. In particular, the president cannot refuse to enforce legislation because it is inconsistent with his policy preferences; he can, however, refuse to enforce/defend legislation that he declares unconstitutional. At the same time, Congress can defend its interests by making use of the weapons in its arsenal, including the power of the purse, the confirmation power, and the power to shift litigation authority away from the Department of Justice (DOJ).

In making these points, I have divided this article into three sections. The first will detail the power of presidential review and, with it, why the president's refusal to defend the constitutionality of legislation is consistent with our system of checks and balances. This

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section will also consider how Congress's power is further limited by Supreme Court restrictions on lawmakers' going into court to defend congressional prerogatives. The second section will explain how it is that the president and Congress bargain over this issue. In so doing, I will highlight how political accommodations between the branches, not the formal divisions of power specified in the Constitution, have resulted in a system that works reasonably well for both Congress and the White House. The third section will examine the Supreme Court's role in all of this, especially the Court's willingness to facilitate litigation between Congress and the White House through the appointment of counsel (intervenors and/or amicus) to defend Congress's interests in court.

How the Constitution Limits Congress's Power to Have Its Interests Represented in Court

In our tripartite system of government, a system of checks and balances, each branch is empowered to independently interpret the Constitution and, in so doing, serve as a bulwark against the aggrandizement of any other branch. Furthermore, each branch possesses core powers—powers that cannot be delegated to another branch. For example, according to article III, courts can only hear “cases or controversies,” not hypothetical disputes. In consequence, even if rendering an advisory opinion were convenient to Congress and/or the White House, article III protects the Court from becoming subservient to the elected branches (Devins and Fitts 1997). Likewise, article II protects executive branch prerogatives. In particular, by independently interpreting the Constitution, presidents need not adhere to “unconstitutional” acts of Congress or to Supreme Court decisions.

Before turning to the question of whether our system of checks and balances places any limits on presidential review, I will say few words on why article II empowers the president this way. First and foremost, our tripartite system assumes that the executive is independent from, not subordinate to, Congress and the courts. To maintain that independence, a president must be able to decide for himself what the Constitution means. By taking an oath to “faithfully execute” his office and to “preserve, protect, and defend” the Constitution, a president affirms that he will not knowingly act in violation of the Constitution as supreme law. For this reason, as recognized both in the *Federalist Papers* and in the debates over the Constitution's ratification, presidential review extends beyond the power to veto legislation on constitutional grounds and to a president's “refus[al] to carry into effect an act that, [in his opinion,] violates the Constitution” (James Wilson, as quoted in Jensen 1976, 450).

The power of presidential review, moreover, is amply supported by historical practice. Starting with Thomas Jefferson's decision to pardon “every person under punishment or prosecution under” the Alien and Sedition Acts (which criminalized speech critical of the government), presidents—by independently interpreting the Constitution—have departed from the constitutional judgments of Congress and the courts (Devins and Fisher 1998). The courts have also acknowledged presidential review. By refusing to hold the president in contempt for failing to defend the constitutionality of Congress's handiwork, Supreme Court justices recognize that “the means [available to a president] to resist legislative encroach-

ment[s]" include the power "even to disregard [laws]" that a president deems "unconstitutional" (*Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 906 [1991] [Scalia, J. concurring]). Presidential review, finally, is conceded by Congress. Recognizing that it cannot "entrust the defense of its vital constitutional powers to the advocate[s] for the executive branch" (U.S. Senate 1977, 11), Congress has enacted legislation requiring the attorney general to inform it of cases in which the DOJ will not defend the constitutionality of a federal statute (Pub. L. No. 96-132, § 21[a][2], 93 Stat. 1049-50).

In saying that a president need not execute laws that he deems unconstitutional, I do not mean to suggest that there are no constitutional or prudential limits to the exercise of this power. A president, for example, cannot refuse to carry out a judicial order, even if he thinks the order is premised on an incorrect interpretation of the Constitution. That type of nonacquiescence would place a president above the Court, render the judicial power a nullity, and ultimately cast doubt upon the very foundation of democratic government: namely, the rule of law. Moreover, to the extent that our tripartite system was designed to give each branch an opportunity to check the other, there is real appeal to the president's enforcing a law to set the stage for a court challenge. Indeed, out of respect for both Congress's lawmaking prerogatives and the judicial power to interpret the Constitution, Office of Legal Counsel (OLC) opinions allow for a president, as a matter of prudence, to enforce constitutionally suspect legislation. According to these opinions, "The President should presume that enactments are constitutional" and should "execute the statute, notwithstanding his own beliefs about the constitutional issue" if he thinks the Supreme Court would sustain the statute (OLC 1994, 200). At the same time, the president cannot mute his own voice in the name of judicial review. As such, presidential review anticipates that executive branch filings will reflect the president's understanding of the Constitution. And while it would simplify matters if federal courts allowed the president to enforce a law while arguing that it is unconstitutional (Johnsen 2000; Waxman 2001), the article III "case or controversy" requirement may foreclose the executive from making arguments identical to the arguments made by the party challenging executive branch enforcement.

What then of Congress's power to defend its institutional prerogatives by appearing as a party in lawsuits challenging the constitutionality of its handiwork? In 1978 and 1979, Congress reacted to "a need for representation felt in the post-Watergate era" (Tiefer 1998, 48) by creating the Senate legal counsel and by directing the newly minted House general counsel to represent Congress's institutional interests through litigation. Congressional participation in litigation has also been facilitated by the aforementioned statute requiring the attorney general to notify Congress whenever the DOJ refuses to defend the constitutionality of legislation. But when it comes to protecting Congress from presidential refusals to enforce or defend federal statutes (or, for that matter, presidential refusals to present legal arguments in a manner consistent with lawmaker preferences), these initiatives—while symbolically important—offer Congress limited protection. First, in the case of presidential nonenforcement, it may well be that there is no lawsuit and, consequently, no opportunity to defend the constitutionality of Congress's action. More to the point, federal courts adjudicate claims of *actual* injury, and as such, it is typically the case that the government must do something to someone before a litigant has standing to challenge the constitutionality of federal legislation. Second, federal courts, including the Supreme Court, are reluctant to par-

ticipate in internal disputes between Congress and the White House. In a 1997 decision rejecting the standing of lawmakers to challenge line item veto legislation (*Raines v. Byrd*, 521 U.S. 811 [1997]), the Court—as Justice Souter wrote in a concurring opinion—feared exposing itself to the “risk” of becoming embroiled in “a power contest nearly at the height of its political tension” (*ibid.*, 833). Likewise, courts have generally steered clear of disputes over congressional efforts to compel executive officials to turn over information, arguing that these matters are best resolved through bargaining between the White House and Congress (Devins 1996).

I do not mean to suggest that Congress is without power here. For example, amicus briefs are regularly filed by individual lawmakers as well as House and Senate counsel. On rare occasions, moreover, the principal antagonists before the Supreme Court are the House and Senate (defending the constitutionality of legislation) and the president (attacking it). But these occasions seem limited to disputes over the separation of powers; also, the Court has not resolved such a dispute since its 1997 decision limiting lawmaker standing (including, one assumes, the standing of the Speaker of the House and his lawyer, the House general counsel). And if that is not enough, Senate legal counsel representation is contingent on a vote of the Senate and, as such, is limited to bipartisan matters.

Congress, when all is said and done, cannot rely on its own agents to defend the constitutionality of legislation (and, more generally, to ensure that the arguments it favors are made in court). At the same time, Congress’s desires almost always find expression in litigation. One way or another, statutes that the president finds unconstitutional make their way into court. And when the DOJ refuses to defend these statutes (or refuses to make all the arguments that Congress would like it to make), counsel for Congress or some private party can fill that void. Finally, Congress has been somewhat successful in convincing DOJ lawyers (and other government lawyers) to advance congressionally favored arguments in court.

In the next part of this article, I will explain why Congress has been able to bargain successfully with the president and agency heads over the types of arguments that government lawyers make in court. Specifically, I will argue that each side has strong incentives to work with the other. In other words, rather than look to the formal division of powers specified in the Constitution, Congress and the White House have forged accommodations that reflect the repeat-player nature of their interactions, that is, the need for each branch to work with the other to stave off gridlock.

How Congress–White House Bargaining Defines What Government Lawyers Say in Court

Why is it that the president, as a general rule, is committed “to afford[ing] the Supreme Court an opportunity to review the constitutional judgment of the legislative branch?” (OLC 1994, 201). The separation of powers, if anything, forbids the president from defending a statute that he deems unconstitutional. Also, the very structure of the federal government’s litigation authority is largely designed to allow the attorney general to manage litigation as he or she sees fit. Congress has specified that “except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a

party, or is interested" is reserved to the DOJ working "under the direction of the Attorney General" (Pub. L. No. 89-554, § 4[c], 80 Stat. 613).

Yet the president has strong incentive to work with Congress. As I will now detail, Congress can pressure the executive through any one of a number of techniques, including the power to confirm nominees, to cut off funds to the DOJ and other executive agencies, to subject DOJ officials to oversight hearings and other types of jawboning, and finally, to shift litigation authority away from the DOJ (and the concomitant power to shift government operations away from the executive to independent agencies). Against this backdrop, it is little wonder that the president almost always defends the constitutionality of legislation; in particular, by accommodating Congress this way, the president gets something important in return—peace, that is, lawmaker acquiescence to DOJ control of government litigation, especially Supreme Court litigation. Beyond this set of incentives, the president's willingness to defend acts of Congress can be tied to intra-executive pressures, especially the desires of lawyers in the solicitor general's office (which handles Supreme Court litigation for the executive branch and most independent agencies). To maintain its reputation of being "handmaidens to the Supreme Court," (U.S. Senate 1985, 486), there are strong incentives for lawyers in the solicitor general's office to defend the constitutionality of statutes and, in this way, appear apolitical.

How Congress Pressures Government Lawyers

What follows are some examples of how Congress has used its various powers to affect what government lawyers say in court (focusing on DOJ lawyers but also considering independent agency lawyers whose heads, like the president, have the power to interpret the Constitution independently).

Appropriations. Through its appropriations power, Congress has ample opportunity to pressure the attorney general, solicitor general, and other high-ranking government officials. For example, in response to a 1987 request to increase the appropriations for the Office of the Solicitor General, Congress held hearings "to make a critical assessment of the historical mission of this Office" (U.S. House 1987, 2). More telling, Congress, in 1983, enacted a limitations rider preventing the DOJ from asking the Supreme Court to abandon its per se ban on resale price maintenance agreements. Specifically, after the Reagan DOJ filed a Supreme Court brief attacking the per se rule, Congress (before oral argument in the case) enacted legislation providing that "[n]one of the funds appropriated . . . may be used for any activity the purpose of which is to overturn or alter the per se prohibition on resale price maintenance" (Pub. L. No. 98-166, §510, 97 Stat. 1102 (1983)). Likewise, Congress, in 1985, used its power of the purse to influence (albeit in a small way) the government's handling of litigation involving the Competition in Contracting Act of 1984 (Pub. L. No. 98-369, 98 Stat. 1200). As originally enacted, disappointed bidders for government contracts could stay the award of the contract by filing a protest with the comptroller general. President Ronald Reagan thought the statute unconstitutional (by having a legislative official, the comptroller general, oversee the awarding of government contracts, an executive branch function). Through the Office of Management and Budget, Reagan directed executive agencies to ignore the statute

(Office of Management and Budget 1984). Notwithstanding this directive, a federal district court concluded that the government could not ignore the statute (responding to a complaint filed by a disappointed bidder who wanted to take advantage of the stay provision) (*Ameron, Inc. v. U.S. Army Corps of Engineers*, 607 F. Supp. 962, 963 [D.N.J. 1985]). The White House, however, refused to bend. Attorney General Edwin Meese, for example, told the House Judiciary Committee that the government would ignore any lower court decision on the issue. In response, the House Government Operations Committee voted to cut off all funds for the Office of Attorney General, prompting the Reagan administration to instruct agencies to comply with the stay provision and, in this way, back away from its hard-line position (Fisher 1998, 115; Struck 1985).

An even more dramatic example of Congress using its appropriations power involved the Federal Communications Commission (FCC), an independent agency with the power to litigate cases before federal courts of appeal. In 1987, Congress took aim at FCC efforts to reexamine its policies on race preferences and the concurrent ownership of newspapers and television stations (Devins 1993). Specifically, Congress enacted limitation riders prohibiting the FCC "to repeal, to retroactively apply changes in, or to begin or continue a re-examination of" these policies (Pub. L. No. 100-202, 101 Stat. 1329). In this way, Congress intended to back the FCC into a corner, effectively compelling it to defend the constitutionality of these policies. Indeed, the Senate report accompanying the affirmative action rider specifically "instruct[ed] the Commission" to defend race preferences in several pending D.C. Circuit cases (U.S. Senate 1987, 77). And while the FCC could have argued that Congress cannot undermine its power to interpret the Constitution, it instead abided by Congress's unorthodox request.

Confirmations. The Senate sees its confirmation power as a way of securing promises from DOJ nominees about their willingness to enforce the law as written by Congress, including the defense of federal statutes. For example, when confirming solicitor general nominees Seth Waxman (nominated by Clinton in 1997) and Ted Olson (nominated by Bush in 2001), senators focused their inquiry on the willingness of these nominees to—if need be—break rank with White House policy preferences by defending *all* federal statutes. On this score, the Olson hearings are especially instructive; Senate Democrats secured promises from Olson that he would defend Congress's power under the Constitution's spending clause as well as proposed campaign finance reform legislation (U.S. Senate 2001). Perhaps more telling (although not involving a dispute over the DOJ's willingness to defend the constitutionality of legislation), Congress, in 1994, utilized its confirmation power to rein in DOJ policy making on environmental crimes. By holding the nomination of Lois Schiffer, Clinton's choice to head the DOJ's environment division, Congress forced the DOJ to restructure its environmental criminal enforcement operation to satisfy lawmaker demands. Specifically, the Clinton DOJ returned control of environmental criminal enforcement to decentralized U.S. attorney's offices and away from main Justice (Devins and Herz 1998, 214-15).

Jawboning. Congress sometimes communicates its disapproval of DOJ filings through oversight hearings and other jawboning techniques. Oversight hearings, for example, were

held to question DOJ officials about their failure to enforce a 1968 statute overriding *Miranda v. Arizona* (Cassell 1999) as well as Reagan DOJ efforts to moot *Bob Jones University*, a First Amendment challenge to the then-existing IRS policy of denying tax breaks to racist schools (U.S. House 1982). Also, in 1993, Congress lashed out at Clinton DOJ efforts to limit the force of a 1984 child pornography law (Pub. L. No. 87-292, § 5[a][4], 98 Stat. 205). Specifically, rejecting arguments successfully advanced by the prior administration, the Clinton DOJ joined forces with the American Civil Liberties Union in arguing that the statute did not apply to young girls dressed in scanty apparel (Greenhouse 1993). In so doing, the DOJ sought to prevent the Supreme Court from ruling on the issue, because its views and the criminal defendant's views were in sync with each other (*ibid.*). But Congress responded with a vengeance. All one hundred senators voted for a resolution condemning the brief, and a 1994 crime bill included a section expressing Congress's sense that the 1984 law, in fact, did apply to children wearing scanty apparel (Greenhouse 1995). Responding to this intense jawboning, the Clinton DOJ relented, shifting its position in court and arguing in favor of a broad interpretation of the 1984 law (*ibid.*).

Litigation authority. The most potent of Congress's weapons to affect government lawyering is placing litigation authority in some entity (typically an independent agency) outside of the DOJ. For example, in response to the perceived failure of the DOJ to represent adequately the Federal Trade Commission (FTC), Congress granted the FTC independent litigating authority as part of the 1975 FTC Improvements Act (Devins 1994, 269-77). On other occasions, Congress has been able to defang the DOJ without explicitly removing its litigation authority. Consider, for example, how Congress expressed its disapproval of DOJ representation of the Environmental Protection Agency (EPA). When the DOJ refused to sue federal entities for violating environmental laws (claiming that such lawsuits were impermissible on both sovereign immunity and article III standing grounds), Congress limited DOJ authority in two ways (Devins and Herz 1998, 216-17). First, it waived sovereign immunity so that states and environmental interests could sue federal polluters. Second, it authorized the EPA to conduct administrative enforcement actions against federal facilities so that the government did not need to sue itself in federal court.

For the most part, however, Congress does not make use of its power over litigation authority. Appropriations, jawboning, and confirmations are less draconian techniques that have worked quite well in practice. Also, since the president must sign legislation establishing or transferring litigation authority outside the DOJ, Congress is limited in its ability to affect litigation authority. Finally, Congress, a reactive institution, is far more interested in getting the DOJ to do its bidding in a particular dispute than it is in redefining who speaks the government's voice in court.

How Government Lawyers Defend Their Turf

In detailing how Congress sometimes pressures government lawyers to defend Congress's interests in court, I think it important to remember that these episodes are truly extraordinary. The president hardly ever deems a federal statute unenforceable for constitutional reasons. Moreover, the DOJ is quite happy to defend the constitutionality of federal

statutes, for its status is enhanced by routinely making such defenses. Perhaps more significant, Congress is generally accepting both of the power of government lawyers to craft legal arguments and the power of the president to, on rare occasion, decline to defend a statute. In part, this acquiescence is a by-product of the fact that some litigant (whether it be an independent agency, a private party, or Congress itself) is defending the constitutionality of the law. And as long as a court will hear the case, House and Senate counsel and/or individual lawmakers can file amicus briefs. In other words, as I will now explain, the system works reasonably well for both government lawyers and congressional interests.

To start, the president's willingness to enforce all (or nearly all) of the laws and, correspondingly, the presumption of constitutionality accorded legislation by the DOJ is a by-product of the legalistic, court-centered culture that often dominates the DOJ. In particular, the OLC (which advises the president and executive agencies on constitutional questions) and the solicitor general's office are committed to norms of professionalism and independence, including the corresponding ideals of precedent and judicial-style decision making. The OLC, for example, is intensely interested in "upholding the reputation of the office as an elite institution whose legal advice is independent of the policy and political pressures associated with a particular question" (McGinnis 1993, 422). It is little wonder that such an institution would embrace judicial resolution of constitutional issues; otherwise, the OLC would be subject to charges of twisting its constitutional interpretations so that the president could put his policy agenda into place (by, for example, refusing to enforce laws that he dislikes). Likewise, the solicitor general's reputation for professionalism and independence is tied to the myth that his allegiances run outside of the executive branch and to the Supreme Court and, more generally, the rule of law (Caplan 1987). And while this myth misleads as much as it informs (Clegg 1987), it is certainly true that the solicitor general maximizes influence with both the Supreme Court and other parts of the government by seeing himself both as an officer of the Court and an advocate for the government. Specifically, the power of the solicitor general (and especially the careerist attorneys who work under him) is tied to his reputation for independence. Accordingly, there is little incentive to refuse to defend an act of Congress, especially when such a decision places his office on the sidelines and opens him up to charges of acting politically.

Because government lawyers are almost always defending federal statutes in court, Congress rarely involves itself in government lawyering. Instead, Congress's practice is to let government lawyers make whatever arguments they like in court, including, on occasion, arguments that Congress's handiwork is unconstitutional. Before the Supreme Court, for example, the solicitor general has filed competing briefs in the same case (one arguing for constitutionality, one arguing against) (Waxman 2001, 1081-82), presented competing arguments in the same brief (Devins 1994, 314), and informed the justices that the president and the DOJ think the statute before them is unconstitutional but that "it is fair to Congress—and, indeed, it is fair to this court—that the other view of constitutional power should be fully and fairly presented" (Brief for the United States at 28, *Miles v. Graham*, 268 U.S. 501 [1925]). Needless to say, were the DOJ to regularly engage in such Congress bashing, lawmakers might make aggressive use of their powers of the purse, confirmations, and the like. But these statements are quite unusual and, as such, Congress rarely feels the need to respond to them.

Much the same can be said of instances in which government lawyers refuse to defend the constitutionality of legislation. Here, however, the critical question seems to be whether that refusal could moot the case (as was true with *Bob Jones University* and the Clinton-era child pornography case). More to the point, as long as someone is vigorously defending the constitutionality of the statute, Congress seems amenable to that someone's being an entity other than the DOJ (as long as the DOJ views such cases as truly extraordinary). For example, in *Metro Broadcasting v. FCC* (497 U.S. 547 [1990]), the solicitor general allowed the FCC to defend congressionally mandated diversity preferences before the Supreme Court—so that it could attack these preferences without dismissing the case on mootness grounds. Likewise, Congress did not protest the solicitor general's refusals to defend either the independent counsel statute or legislation creating the Federal Election Commission (FEC)—so that the defense of these statutes was left to the FEC and the independent counsel. More striking, Congress did not blink when the DOJ argued in court that the 1984 Competition in Contracting Act was unconstitutional (even though Congress had just prodded the Reagan DOJ into enforcing the law). Apparently, lawmakers took comfort in the fact that, since this lawsuit was filed by a private contractor seeking judicial enforcement of the statute, there was no risk of the case being tossed out on mootness grounds. Indeed, in nearly all of these cases, Congress participated—by either filing an amicus brief or participating as a party-intervenor.

As the above discussion reveals, Congress and the president have good reason to feel satisfied with the current arrangement. On those rare instances in which Congress disapproves of what government lawyers are saying in court, Congress has the institutional resources to advance its agenda with the DOJ and other parts of government. For their part, government lawyers almost always can make the argument they want in court. At the end of the day, presidential review has allowed the White House to interpret the Constitution without denying Congress an opportunity to have some advocate (even if it is not the DOJ) defend the constitutionality of legislation. As long as this arrangement can be maintained, comity between the branches should remain the norm.

Indeed, comity between the branches is sufficiently strong that, on occasion, Congress has amended some laws in the face of solicitor general claims of unconstitutionality. For example, after the solicitor general informed Congress that he agreed with a lower court ruling that a statute providing reimbursement to Christian Scientists for nonmedical nursing care was unconstitutional (*Children's Healthcare Is Legal Duty v. Vladeck*, 938 F.Supp. 1466 [D. Minn. 1996]), Congress worked with the DOJ in rewriting the statute (Waxman 2001, 1080-81). Even more striking, Congress accommodated the DOJ by amending a 1996 statute that required the discharge of HIV-infected service members, even those who were medically able to serve (Pub. L. No. 104-106, § 567, 110 Stat. 186 *repealed by* Pub. L. No. 104-134, tit. II, § 2707[a][1], 110 Stat. 1321, 1321-30). Specifically, after claiming that it would enforce the statute to facilitate a court challenge to it, the Clinton White House, instead, delayed enforcement so that it could seek a compromise with Congress (Barron 2000, 101). Absent the goodwill engendered by the DOJ's regularly defending federal statutes, it is doubtful whether lawmakers would have engaged in such bargaining.

The Courts' Role in Facilitating White House–Congress Comity

At the start of this article, I spoke of the courts' general reluctance to mediate intermural squabbles between the executive and legislative branches, including lawsuits filed by members of Congress. In concluding the article, I would like to discuss one notable exception to this norm. On occasion, by allowing Congress to intervene as a party to defend the constitutionality of legislation or by appointing amici to defend Congress's interests, the Court has ruled on the constitutionality of federal statutes in cases in which the DOJ and the party challenging the statute agreed with each other. In some ways, this practice facilitates comity between the branches; after all, it ensures that the DOJ cannot nullify legislation by refusing to defend it. With that said, courts must operate within the parameters established by article III of the Constitution.

In sorting out whether and when this practice is permissible, I will discuss two notable examples of it—*Dickerson v. United States* (530 U.S. 428 [2000]) and *INS v. Chadha* (462 U.S. 919 [1983]). First, *Dickerson*: Here, after a federal appellate court sua sponte invoked the *Miranda* override statute, the Clinton DOJ concluded that the criminal defendant was correct in arguing that the override statute was unconstitutional (Devins 2000). At the same time, the Clinton DOJ thought that the government had satisfied its burdens under *Miranda* and, consequently, did not want to dismiss the case. Presented with a truly adversarial dispute over the criminal defendant's guilt, the Supreme Court—rather than dismiss the suit—elected to appoint an amici to defend the statute. In my view, this highly unusual action was appropriate (assuming, that is, that the appellate court was correct in sua sponte raising the override statute). Consider the alternative: namely, forcing the president to either defend a statute he finds unconstitutional (something clearly inconsistent with the president's article II powers) or having the DOJ release a criminal defendant who, in the president's view, broke the law (also inconsistent with the president's article II duty to execute the law).

Contrast these facts to the situation in *INS v. Chadha*. In *Chadha*, the DOJ refused to defend the constitutionality of the legislative veto, preferring, instead, to argue that the veto undermined the president's power to execute the law. Specifically, the DOJ thought that a decision by the attorney general to suspend a deportation was unreviewable by Congress (absent the enactment of legislation satisfying the Constitution's demands of bicameralism and presentment). Rather than treat the legislative veto as a nullity (by refusing to deport Chadha), however, the DOJ argued that it was willing to enforce a court ruling upholding the veto. For this reason, the DOJ argued that the Court should settle this "dispute," notwithstanding the case's apparent lack of adversariness. By allowing counsel for the House and Senate to intervene, the Supreme Court went along with the DOJ's campaign for a definitive judicial resolution of the legislative veto's constitutionality. But it should not have. Unlike *Dickerson*, a decision dismissing *Chadha* would not have interfered with the president's article II powers to both interpret the Constitution and "faithfully execute the laws." The only thing preventing the attorney general from suspending Chadha's deportation was his hope that the Supreme Court would rule on the constitutionality of the legislative veto. Correspondingly, as an article III matter, the *Chadha* litigation was an

abomination. The desire for a court decision, in and of itself, does not support judicial resolution of a case in which there is no disagreement.

The lesson here is simple. A president's power to interpret the Constitution is not the power to demand judicial rulings on these interpretations. Sometimes, a president and Congress need to do battle with each other over the Constitution's meaning. In *Chadha*, the president's squabble was with Congress. While seeking cover behind a court ruling may have made political sense to the president, he should have taken his complaint to Congress. Sometimes, however, courts should intercede in what appears to be a dispute between the political branches. In *Dickerson*, the presence of a clearly adversarial dispute necessitated the appointment of an amicus to defend the *Miranda* override statute. Otherwise, the president's article II power to interpret the Constitution independently would have been jeopardized. In the end, fidelity to the separation of powers—not a desire to enhance the judiciary's power to expound on public values—may well explain the Court's action in *Dickerson*.

Conclusion

On issues involving government lawyering, Congress and the White House have ample incentives and resources to both defend their interests and work with the other. For this very reason, Congress is accepting of a litigation model that almost always leaves it to the president or his designee, the attorney general, to determine whether and how the government will defend the constitutionality of federal legislation. In particular, because Congress's interest in having the government defend federal legislation is typically in sync with the institutional interests of the OLC and solicitor general's office, Congress may well be better off embracing the current hierarchical model (as compared, say, to decentralizing litigation authority among executive and independent agencies). In consequence, although some amount of conflict is inevitable, the best way to resolve that conflict is to let the White House and Congress bargain with each other. For this reason, it is wrong for courts to disregard article III constraints in an effort to facilitate the judicial resolution of constitutional questions.

References

- Barron, David. 2000. Constitutionalism in the shadow of doctrine: The president's non-enforcement power. *Law and Contemporary Problems* 63 (1 & 2): 61-106.
- Caplan, Lincoln. 1987. *The tenth justice*. New York: Knopf.
- Cassell, Paul G. 1999. The statute that time forgot: 18 U.S.C. § 3501 and the overhauling of *Miranda*. *Iowa Law Review* 85:175-259.
- Clegg, Roger. 1987. The thirty-fifth law clerk. *Duke Law Journal*, pp. 964-75.
- Devins, Neal. 1993. Congress, the FCC, and the search for the public trustee. *Law and Contemporary Problems* 56 (4): 145-88.
- . 1994. Unitariness and independence: Solicitor general control of independent agency litigation authority. *California Law Review* 82:255-327.
- . 1996. Congressional-executive information access disputes: A modest proposal—Do nothing. *Administrative Law Review* 48:109-37.

- . 2000. Asking the right questions: How the courts honored the separation of powers by reconsidering *Miranda*. *University of Pennsylvania Law Review* 149:251-85.
- Devins, Neal, and Louis Fisher. 1998. Judicial exclusivity and political instability. *Virginia Law Review* 84:83-106.
- Devins, Neal, and Michael A. Fitts. 1997. The triumph of timing: *Raines v Byrd* and the modern Supreme Court's attempt to control constitutional confrontations. *Georgetown Law Journal* 86:351-75.
- Devins, Neal, and Michael Herz. 1998. The battle that never was: Congress, the White House, and agency litigation authority. *Law and Contemporary Problems* 61 (1): 205-22.
- Fisher, Louis. 1998. *The politics of shared power*. 4th ed. College Station: Texas A&M University Press.
- Greenhouse, Linda. 1993. Supreme Court roundup; child smut conviction vacated after U.S. shift. *New York Times*, November 2, p. B-7.
- . 1995. Court rejects appeal of man convicted in child smut case with political overtones. *New York Times*, January 18, p. D-20.
- Jensen, Merrill, ed. 1976. *The documentary history of the ratification of the Constitution*. Vol. 2. Madison: State Historical Society of Wisconsin.
- Johnsen, Dawn E. 2000. Presidential non-enforcement of constitutionally objectionable statutes. *Law and Contemporary Problems* 63 (1 & 2): 7-60.
- McGinnis, John O. 1993. Models of the opinion function of the attorney general: A normative, descriptive, and historical prolegomenon. *Cardozo Law Review* 15:375-436.
- Office of Legal Counsel. 1994. Opinions of the Office of Legal Counsel. *Presidential Authority to Decline to Enforce Unconstitutional Statutes* 18:199-211.
- Office of Management and Budget. 1984. *Bulletin to the heads of executive departments and agencies* (OMB Bulletin 85-8, December 17). Washington, DC: Office of Management and Budget.
- Struck, Myron. 1985. Meese averts showdown on GAO contract power, agencies told to obey law pending appeal. *Washington Post*, June 5, p. A-21.
- Tiefer, Charles. 1998. The Senate and House counsel offices: Dilemmas of representing in court the institutional congressional client. *Law and Contemporary Problems* 61 (2): 47-63.
- U.S. House. 1982. Committee on Ways and Means. *Administration's change in federal policy regarding the tax status of racially discriminatory private schools: Hearings before the Committee on Ways and Means*. 97th Cong., 2d sess.
- . 1987. Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary. *Solicitor General's Office: Hearings before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary*. 100th Cong., 1st sess.
- U.S. Senate. 1977. Senate Rep. No. 95-170. 95th Cong., 1st sess.
- . 1985. Committee on the Judiciary. *Confirmation hearings on federal appointments: Hearings before the Committee on the Judiciary* (pt. 2). 99th Cong., 1st sess.
- . 1987. Senate Rep. No. 182. 100th Cong., 1st sess.
- . 2001. Committee on the Judiciary. *Consideration of Department of Justice nominees: Hearings before the Committee on the Judiciary*. 107th Cong., 1st sess.
- Waxman, Seth P. 2001. Defending Congress. *North Carolina Law Review* 79:1073-88.