

THE OBAMA ADMINISTRATION'S DECISIONS TO ENFORCE, BUT NOT DEFEND, DOMA § 3

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On February 23, 2011, Attorney General Eric Holder advised Congress that the Department of Justice (DOJ) would no longer defend § 3 of the Defense of Marriage Act (DOMA)¹—the Act of Congress that defines “marriage” for federal purposes as “a legal union between one man and one woman as husband and wife.”² The Attorney General stated: “[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.”³ The Attorney General noted that “there is substantial circuit court authority applying rational basis review to sexual-orientation classifications.”⁴ Furthermore, he acknowledged that the DOJ previously defended § 3 in circuits that ultimately applied rational basis review to classifications by sexual orientation.⁵ Nonetheless, in two pending challenges to § 3 in the Second Circuit—which had not ruled on the controlling standard of review—the President instructed the DOJ not to defend the challenged section. The Attorney General added:

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial

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

² 1 U.S.C. § 7 (2006) (link).

³ Letter from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to the Honorable John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) [hereinafter *Letter to Speaker*], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (link).

⁴ *Id.*

⁵ *See id.*; see also Memorandum from Paul Benjamin Linton, Special Counsel, The Thomas More Soc’y, A Response to the Administration’s Decision Not to Defend Section 3 of the Defense of Marriage Act 13 & n.11 (Mar. 1, 2011), available at <http://www.alliancealert.org/2011/20110301.pdf> (noting that eleven federal circuits have held, in twenty-nine separate opinions, “that homosexuals do not constitute a suspect or quasi-suspect class requiring greater than rational basis review”) (link).

branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.⁶

Obviously, the Obama Administration's decisions not to defend the constitutionality of DOMA—but at the same time, to enforce it—raise significant constitutional questions.

I. DOES THE EXECUTIVE HAVE 1) A DUTY NOT TO ENFORCE UNCONSTITUTIONAL STATUTES, 2) A DISCRETIONARY POWER NOT TO ENFORCE THEM, OR 3) A DUTY TO ENFORCE THEM?

Plainly, the Executive has no duty to enforce an unconstitutional statute. The Executive is charged with the faithful execution of “the law,” and an unconstitutional statute is not law.

The harder question is whether the Executive has a duty not to enforce an unconstitutional statute, or the discretion to decide whether to enforce it or not. Leading constitutional scholars have taken different positions on the matter. Walter Dellinger, whose views the current DOJ appears to be tracking, has maintained that the Executive has discretion not to enforce an unconstitutional law, but not a duty not to do so.⁷ Sai Prakash, on the other hand, argues that the Executive is duty-bound not to enforce an unconstitutional law.⁸

Prakash's reasons, in brief, are these: First, an unconstitutional law is simply void, and thus not “law.” The President has no more a right to enforce such a “law” than he has to enforce the statute of a state or foreign nation.⁹ Second, the President has taken an oath to preserve, protect and defend the Constitution, and enforcing an unconstitutional law would undercut that oath by subordinating it to an unconstitutional law.¹⁰ Third, the Faithful Execution Clause and the Supremacy Clause, combined, also require the President to follow the Constitution rather than unconstitutional laws.¹¹

⁶ *Letter to Speaker*, *supra* note 3 (referring to the President's instruction to the DOJ not to defend § 3 of DOMA in *Windsor v. United States*, No. 10 Civ. 8435(BSJ)(JCF), 2011 WL 3422841 (S.D.N.Y. July 28, 2011), and Complaint for Declaratory and Injunctive Relief, *Pedersen v. Office of Personnel Management*, No. 310 CV 1750 VLB (D. Conn. Nov. 9, 2010), 2010 WL 4483820).

⁷ See Memorandum from Walter Dellinger, Assistant Att'y Gen., to Abner J. Mikva, Counsel to the President (Nov. 2, 1994), available at <http://www.justice.gov/olc/nonexecut.htm> (link).

⁸ Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Law*, 96 GEO. L.J. 1613, 1616 (2008) (link).

⁹ *Id.*

¹⁰ *Id.* at 1616–17.

¹¹ *Id.* at 1617.

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I believe that Prakash is correct. In addition to Prakash's powerful textual and structural reasons, sound policy supports his claims. To assume that the President has the "discretion" to decide whether to enforce an unconstitutional law or not is to expand the President's power in a way that invites opportunism and irresponsibility. The President can pick and choose among unconstitutional statutes and decide which of them to execute—probably with an eye on his or her political fortunes. On the other hand, holding that the President has an affirmative *duty* not to enforce an unconstitutional law is to encourage a more disciplined and careful use of executive power. Presidents will be required to make constitutionally principled enforcement decisions regardless of their political effect. Presidents will be forced to become more circumspect and reflective in categorizing statutes as "unconstitutional" when the practical consequences of such a determination are inescapable.

II. IF THE EXECUTIVE HAS A DUTY NOT TO ENFORCE UNCONSTITUTIONAL LAWS, IS IT NONETHELESS BOUND (OR AT LIBERTY) TO DEFEND THEM IN CONSTITUTIONAL LITIGATION?

If a law is unconstitutional, the Executive has a duty not to enforce it. Therefore, the Executive must not enforce it *even if the courts uphold it*. The fact that the courts uphold a law as constitutional does not entail that it is constitutional. Contrary to *Cooper v. Aaron*,¹² the Constitution is not necessarily what the Supreme Court says it is: the Constitution's meaning is not the same as the *interpretation* of that meaning, even by high judicial authority. Only on that understanding can we explain why the Court itself—though less often than it should—has confessed error and overruled mistaken constitutional precedents.

Because the Supreme Court's interpretation of the Constitution is not necessarily correct, and also because the Executive is a co-equal branch with its own sworn responsibility to uphold the Constitution, the Executive has a duty to make its own, independent determination of a statute's constitutionality. Executives in the past have respectfully disagreed with the Supreme Court's views on the Constitution. True, in the most extreme case, an irresolvable difference between the Supreme Court and the President *might* lead to a constitutional impasse, possibly provoking a constitutional crisis. But that kind of crisis has not happened in our country's history, even in the dispute between the Supreme Court and President Nixon over the disclosure of the Watergate tapes.¹³ The explanation probably is that the political costs to the President of a frontal assault on the Court have usually been too high.

¹² 358 U.S. 1, 18–20 (1958) (asserting that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land" under the Supremacy Clause) (link).

¹³ *United States v. Nixon*, 418 U.S. 683 (1974) (link).

If the Executive has a duty not to enforce an unconstitutional law even if the courts uphold it, it follows that there is a practical reason for the Executive not to defend an unconstitutional law from challenge. If the Executive's defense is successful in persuading the courts, the Executive will still be bound to disregard the courts' mistaken decision.

Furthermore, if the Executive defends a statute that is unconstitutional, it increases the likelihood that the courts will heed that defense and sustain the law—thus making it more likely that an unconstitutional law will be treated as if it were constitutional, and raising the chances of an unnecessary confrontation between the branches. This, again, supports the proposition that if a law is unconstitutional, the Executive should not defend it.

III. WHAT IF THE EXECUTIVE IS REASONABLY, BUT NOT COMPLETELY, CERTAIN THAT A LAW IS UNCONSTITUTIONAL?

This of course is the normal situation. In nearly all realistic scenarios, the Executive cannot and will not affirm *categorically* that a challenged statute is unconstitutional—certainly not to the point of maintaining that it will disregard even a Supreme Court ruling that upholds the law. The usual situation is one in which the Executive will take the position that the statute, *by its best lights*, is unconstitutional.

Does the Executive have a duty to enforce the law in that situation? The analysis given thus far does not provide a conclusive answer because there is a logical space between a law that *is* unconstitutional and a law *that the Executive reasonably believes* to be unconstitutional. Just as the courts may be in error about the constitutionality of a statute, so too may the Executive be in error. And just as the Court may overrule a constitutional precedent, a later occupant of the Presidency may also reverse (and correct) a predecessor's view of a statute's constitutionality.

In Prakash's view, the risk that the President "will make constitutional errors in the course of deciding whether the Constitution permits him to enforce particular statutes . . . hardly means that the President lacks a duty to disregard statutes he regards as unconstitutional."¹⁴ There are at least two ways to understand this view. One way has to do with higher-order beliefs about beliefs. The other has to do with the degrees of certainty of particular, first-order beliefs. Prakash might mean that the President's general belief that some of his particular beliefs on the unconstitutionality of statutes do not relieve him from the duty of acting on his belief about a particular statute's unconstitutionality in a particular case. That is true. But the more relevant question is whether a President's belief that a particular statute is unconstitutional may not be so tempered by countervailing arguments in favor of its constitutionality that he may be justified in

¹⁴ Prakash, *supra* note 8, at 1643.

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defending it, at least for the purpose of seeking the views of courts and opposing litigants. A mother might believe that her son is indeed guilty of a crime, but nonetheless defend him because she expected that that conduct would bring further evidence to light that bore on the truth of her belief.

When the Executive is uncertain, there are no bright-line constitutional rules to guide its behavior. Instead there would seem to be, at best, protocols that have “constitutional underpinnings.”¹⁵ The past practice of the Executive branch—including the Executive’s own self-conscious reflections on that practice—provides some assistance in formulating those protocols.

If the Executive is strongly convinced that a law is unconstitutional, but *not* so convinced that it would decline to enforce the law even if the Supreme Court sustained the law on what the Executive considered adequate grounds, then the Executive should continue to enforce the law *if such enforcement is necessary to secure a judicial opinion on the subject of the law’s constitutionality*. Thus, the Executive should not moot out such a case. The Executive may thereafter take the judiciary’s opinions into account (including concurring and dissenting opinions) when making its own final, independent decision about enforcing the law. The courts’ opinions may bring arguments to light that the Executive had not considered before, or to which it had given insufficient weight. The Executive may also give more weight to a unanimous decision than to a badly split one. Listening to the views of the courts is a facet of a reasonable process of error-avoidance that the Executive could justifiably choose to follow in reaching its own, independent constitutional judgments. The Supreme Court typically follows the same course by waiting for several circuit courts to express opinions on a contentious constitutional question before ultimately deciding it.

If, however, the litigation challenging the statute can go forward even when the Executive discontinues enforcement (perhaps because nonenforcement does not bring relief to litigants in pending cases), then the Executive should cease to enforce the statute.

In most cases, therefore, it would seem that the Executive has a duty *not* to enforce a statute that it finds unconstitutional. That duty would seem even more binding when the Executive had a firm, reasoned conviction that the statute was unconstitutional.

¹⁵ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“The act of state doctrine does, however, have ‘constitutional’ underpinnings.”) (link). The judge-made act of state doctrine derived from, although it was not impelled by, the constitutional allocation of authority between the Executive and the courts in the sphere of foreign affairs. Here too, the appropriate guidelines for the Executive’s use of its power should be rooted in and serve basic constitutional policies and values, even though the Constitution does not in itself dictate what those guidelines are.

IV. WHAT ABOUT DEFENDING THE CONSTITUTIONALITY OF THE STATUTE IN THOSE SITUATIONS?

These conclusions do not yet reach the question of the Executive's duty to *defend* what it reasonably believes to be an unconstitutional statute. Could the Executive have a duty not to *enforce* such a statute but nonetheless be at liberty to *defend* it against a constitutional challenge?

It seems reasonably clear that the Executive could have a duty not to enforce what it determined to be an unconstitutional statute, and nonetheless also have a right to *defend* that statute, in some limited circumstances—if its defense of the statute were necessary to obtain a judicial ruling on the statute's constitutionality, and the Executive considered such a ruling advisable or important.¹⁶ But in many cases, the Executive can cede the defense of a statute to other, capable hands (as has happened in the litigation over § 3 and in other classic cases of nondefense¹⁷). If the Executive's decision not to defend a statute does not preclude the courts from considering and ruling on a reasoned and effective defense of it, and if the Executive's nonenforcement of the statute does not moot out all challenges or otherwise prevent cases from going forward, then there would seem to be no reason why the Executive should not decline *both* to enforce and to defend the statute.

In fact, the Executive's decision not to *enforce* a statute that it has concluded it cannot *defend* is one test of the Executive's good faith in claiming to find the statute unconstitutional. A declination to defend a statute while still enforcing it will normally incur much lower political costs for the Executive than a decision *neither* to defend *nor* to enforce it. A nonenforcement decision typically has consequences that are immediately visible to the public. Here, for instance, nonenforcement would mean that same-sex couples married under state law could receive federal benefits previously available only to heterosexual married couples. A decision not to defend, in itself, carries much less political exposure for the Executive. If the courts eventually strike down a statute that the Executive has enforced but not defended, the Executive can deflect criticism for the statute's subsequent nonenforcement onto the judiciary. If, on the other hand, the courts uphold the statute, the Executive can mitigate any political damages for not having defended it by continuing to enforce it.

¹⁶ A judicial ruling could be useful for the Executive in several ways. The court might strike the statute down, thus confirming the Executive in its belief that the statute was unconstitutional. Or the court might sustain the statute. The Executive, however, might find the court's reasoning so unpersuasive that that result also confirmed its belief that the statute was unconstitutional. Finally, the court might affirm the statute on grounds that the Executive, after reconsideration, found to be persuasive.

¹⁷ See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (link).

V. HOW SHOULD THE OBAMA ADMINISTRATION'S DECISIONS BE EVALUATED?

By the standards suggested above, the Administration's decisions are incoherent and unprincipled.

The Attorney General's letter demonstrates that the Obama Administration very firmly believes that § 3 is unconstitutional. Mr. Holder writes:

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. *The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional.*¹⁸

Further underscoring the depth of the Administration's conviction that § 3 is unconstitutional, the Administration's position rejects the clear preponderance of federal appellate opinion on the correct standard of review. Moreover, the Attorney General also acknowledges that the DOJ is departing from its "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense. . . . This is a rare case where the proper course is to forego the defense of this statute."¹⁹

Given the strength of the Administration's constitutional convictions concerning § 3, it is inexcusable for the Administration to continue to enforce it. None of the justifications the Attorney General puts forward for continuing enforcement are remotely adequate. To say that enforcement is "consistent with the Executive's obligation to take care that the laws be faithfully executed" is to subordinate the President's "faithful execution" of the Constitution (by his best lights) to the enforcement of § 3. Furthermore, the statement raises the question of how the President can be "faithfully executing" the laws if he leaves them undefended against constitutional challenges.

Equally unpersuasive is the Attorney General's claim that a policy of enforcement "respects the actions of the prior Congress that enacted DOMA."²⁰ Either those actions *demand* respect—because they were fully constitutional—or they do not. If they are unconstitutional, they should be neither enforced nor defended. Worst of all, however, is the Attorney

¹⁸ *Letter to Speaker, supra* note 3 (emphasis added).

¹⁹ *Id.* (emphasis added).

²⁰ *Id.*

General's statement that a policy of nonenforcement "recognizes the judiciary as the final arbiter of the constitutional claims raised."²¹ To say that is to openly abdicate the Executive's sworn duty to reach *its own, independent* understanding of the Constitution.²²

The situation would be different if the Administration could not decline enforcement of Section 3 without thereby preventing the judiciary from hearing challenges to it—but the Attorney General does not say that, and it may not be true. The situation might also be different if the Administration admitted that although § 3 seemed unconstitutional by its best lights, the Administration was sufficiently uncertain about that conclusion to decline to enforce the section. But far from admitting even some degree of uncertainty about the section's unconstitutionality, Mr. Holder goes to considerable length to stress how certain the Administration is of its conclusion.

The Administration's position rests ultimately on the assumption that it has *discretion* whether or not to enforce a statute that it firmly believes to be unconstitutional. If the argument outlined above is correct, that premise is simply mistaken. The Administration's decision—enforce § 3, but do not defend it—may make sense, as muddled compromises often do, in raw political terms. In legal and constitutional terms, it is a hash.

²¹ *Id.*

²² Note also the Attorney General's statement that this is a "rare" case in which it is justifiable for the Executive to depart from the "longstanding" practice of defending Acts of Congress "if reasonable arguments can be made in their defense." *Id.* Contrast Mr. Holder's prior advice to Congress in 2009 that he would defend the constitutionality of a bill granting voting representation in the House of Representatives to the District of Columbia were such a bill enacted. Carrie Johnson, *Some in Justice Department See D.C. Vote in House as Unconstitutional*, WASHINGTONPOST.COM, Apr. 1, 2009, www.washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104426.html (link). Media reports at the time stated that in that instance, Mr. Holder had disregarded the advice of his own Office of Legal Counsel that the bill in question was plainly unconstitutional because the Constitution reserves voting representation to States, and the District is not and cannot be a State. *See, e.g., id.* Instead, Mr. Holder relied on the advice of his Solicitor General's Office that the bill was not indefensible in litigation. *See* John O. McGinnis, Commentary, *An End Run Around the Rule of Law*, EXECUTIVE WATCH, Apr. 6, 2009, <http://executivewatch.net/2009/04/06> (link). Mr. Holder is thus in the position of saying that he *would* defend the constitutionality of a *plainly* unconstitutional Act of Congress granting voting representation to the District of Columbia while *not* defending an Act of Congress whose constitutionality had been affirmed by most federal circuits and denied by none. Mr. Holder's treatment of the two situations demonstrates that his constitutional judgments are profoundly politicized.