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# In Defense of the Obama Administration's Non-Defense of DOMA

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# IN DEFENSE OF THE OBAMA ADMINISTRATION'S NON-DEFENSE OF DOMA

DANIEL J. CROOKS III\*

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## INTRODUCTION

The Constitution charges the President with the duty to “take Care that the Laws be faithfully executed . . . .”<sup>1</sup> Moreover, the President takes an oath to “preserve, protect and defend the Constitution of the United States.”<sup>2</sup> Although “[g]enerally, these duties are compatible . . . , when the Executive faces a law that he believes is unconstitutional, he must decide whether the law should be executed as written and defended if attacked, or whether the duty of faithfulness to the Constitution requires its repudiation.”<sup>3</sup> This decision belongs to the President alone as the head of a co-equal branch of the federal government.<sup>4</sup> The doctrine of separation of powers dictates, *inter alia*, that the President enforces the laws that Congress passes.<sup>5</sup> But, a constitutional problem arises “[w]hen the President’s obligation to act in accord with the Constitution appears to be in tension with his duty to execute laws enacted by Congress . . . .”<sup>6</sup> When advising the President, the Department of Justice (DOJ) has maintained since at least 1860<sup>7</sup> that “the Constitution provides the President with the authority to refuse to enforce unconstitutional provisions.”<sup>8</sup> However, reasonable minds disagree as to the appropriate standard that should be used by the President and the DOJ when deciding whether or not to enforce a stat-

<sup>1</sup> U.S. CONST. art. II, § 3.

<sup>2</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>3</sup> See Michael T. Brady, Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 972 (1983) (discussing executive discretion over the defense of statutes).

<sup>4</sup> See Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1632 (2008) (noting that “the President alone must take a constitutional oath” and that “[t]his duty bars the President from violating the Constitution himself or aiding and abetting the violations of others . . . .”); see also Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77, 81 (2011), available at <http://www.law.northwestern.edu/lawreview/colloquy/2011/21/LRColl2011n21Ball.pdf> (“[T]he President, as the leader of a co-equal branch of government, has an independent duty to interpret and apply the Constitution.”).

<sup>5</sup> See Brady, *supra* note 3, at 970 (defining “separation of powers”).

<sup>6</sup> Memorandum by Assistant Attorney General Walter Dellinger to Counsel to the President on Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 U.S. Op. O.L.C. 199, 203 (1994) [hereinafter 1994 Dellinger Memorandum].

<sup>7</sup> See *id.* at 199 (“Opinions dating to at least 1860 assert the President’s authority to decline to effectuate enactments that the President views as unconstitutional.”) (citing Memorial of Captain Meigs, 9 Op. Att’y Gen. 462, 469-70 (1860) (arguing that the President was not obligated to enforce a statute appointing an officer, where the appointment of officers was peculiarly an Executive Branch function)).

<sup>8</sup> Memorandum by Acting Assistant Attorney General Timothy E. Flanigan to Counsel to the President on Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 31 (1992) [hereinafter 1992 Flanigan Memorandum]; see Memorandum by Assistant Attorney General William P. Barr to Counsel to the President on Issues Raised by Section 102(c) (2) of H.R. 3792, 14 Op. O.L.C. 37, 46 (O.L.C.) (1990) [hereinafter 1990 Barr Memorandum] (“The Department of Justice has consistently advised that the Constitution provides the President with such authority.”); *contra* Memorandum from Attorney General Benjamin R. Civiletti to the Secretary of the Department of Education on the Constitutionality of Congress’ Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21, 29 (1980).

ute.<sup>9</sup> Moreover, substantially less has come out of the DOJ regarding the President's decision not to defend legislation.<sup>10</sup>

The purposes of this paper are: (1) to summarize the case law, Office of Legal Counsel (OLC) opinions, and scholarship pertaining to the doctrines of non-enforcement and non-defense; (2) to propose workable standards for both non-enforcement and non-defense that can be used by future Presidents and the DOJ; and, (3) to apply these standards to President Obama's recent decision to continue to enforce, but to not defend, Section 3 of The Defense of Marriage Act (DOMA)<sup>11</sup> in order to show why the decision was proper.

Part I explores the distinction between executive non-enforcement and executive non-defense. Part I.A discusses the case law (I.A.1), OLC opinions (I.A.2), and scholarship (I.A.3) addressing non-enforcement, while Part I.B explores the case law (I.B.1), OLC opinions (I.B.2), and scholarship (I.B.3) regarding non-defense. Part II briefly surveys the history of DOMA and the recent decision by the Obama administration not to defend Section 3 of DOMA. Finally, Part III proposes standards to be used by future administrations faced with whether to enforce and defend a statute, and the section ends by applying the standards to conclude that the Obama administration's decision to continue to enforce, but not to defend, Section 3 of DOMA was proper.

## I. THE DISTINCTION BETWEEN NON-ENFORCEMENT AND NON-DEFENSE

### A. NON-ENFORCEMENT

There is no uniform standard to guide Presidents in deciding whether or not to enforce a statute. While only a handful of federal court cases have addressed the topic,<sup>12</sup> opinions from the DOJ's Office of Legal Counsel (OLC) have expounded on non-enforcement through various memoranda over the years. Finally, several legal scholars have analyzed the available case law and executive branch legal opinions in an attempt to synthesize the various tests. The relevant federal cases, OLC opinions, and legal scholarship follow.

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<sup>9</sup> See *infra* Part I.A.3 (discussing differing views from three scholars).

<sup>10</sup> Ball, *supra* note 4, at 77 n.7 (stating that "most of the literature in this area[] addresses the President's authority to refuse to enforce (as opposed to the authority to refuse to *defend*) a federal statute").

<sup>11</sup> 1 U.S.C. § 7 (1997).

<sup>12</sup> See, e.g., 1994 Dellinger Memorandum, *supra* note 6, at 199; *Myers v. United States*, 272 U.S. 52 (1926); *Freytag v. Commissioner*, 501 U.S. 868 (1991); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

## 1. CASE LAW

Only one Supreme Court case has addressed the theory of executive non-enforcement: *Kendall v. United State ex rel. Stokes*.<sup>13</sup> However, because the statements likely were dicta,<sup>14</sup> no federal court has had the opportunity to rule squarely on the question of whether and to what extent the President may decline to enforce statutes. In addition to *Kendall*, there are three Supreme Court and three circuit court cases that indirectly address the propriety of executive non-enforcement.<sup>15</sup>

*Kendall* was an appeal from a circuit court, which issued a writ of mandamus to compel the Postmaster General to pay out certain funds owed to mail carriers pursuant to statute.<sup>16</sup> In the course of its opinion affirming issuance of the writ, the Court stated that “[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”<sup>17</sup> Although the issue was not before the Court, *Kendall* represents the Court’s most pointed statement about the propriety of non-enforcement.

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<sup>13</sup> 37 U.S. 524 (1838).

<sup>14</sup> See *id.* at 609 (stating questions presented limited to “1. Does the record present a proper case for a mandamus; and if so, then, 2. Had the circuit court of this district jurisdiction of the case, and authority to issue the writ.”).

<sup>15</sup> For the sake of brevity, but in an attempt to be as thorough as possible in detailing the relevant case law, the pertinent federal district court cases and an on-point dissent from a Seventh Circuit case will be addressed in this footnote. Some cases support the proposition that the President may, consistent with the Constitution, decline to enforce statutes he believes are unconstitutional, while some cases do not. Compare *Haring v. Blumenthal*, 471 F. Supp. 1172, 1179 (D.D.C. 1979) (“The President must ‘take Care that the Laws be faithfully executed,’ and he is not permitted to refrain from executing laws duly enacted by Congress.”), *Da Costa v. Nixon*, 55 F.R.D. 145, 146 (E.D.N.Y. 1972) (stating bill passed by Congress and signed into law by President “had binding force and effect on every officer of the Government, no matter what their private judgments of that policy, and illegalized the pursuit of an inconsistent executive or administration policy” and that “[n]o executive statement denying efficacy to the legislation could have either validity or effect”), and *Catano v. Local Board*, 298 F. Supp. 1183, 1188 (E.D. Pa. 1969) (“The President is not at liberty to repeal congressional enactments. . . . That function belongs to Congress alone.”), with *Marozsan v. United States*, 852 F.2d 1469, 1492 n.4 (7th Cir. 1988) (Easterbrook, Coffey, & Manion, JJ., dissenting) (“[N]othing about the constitutional hierarchy implies that *only* judges have the power to place the Constitution above mere law. Every governmental official has the duty to do this. The power of judicial review comes from the hierarchy or rules, with the Constitution superior to law; that same hierarchy applies to every other governmental actor, and each takes an oath of obedience to the Constitution.”) and *United States v. Instruments, S.A., Inc.*, 1993 WL 198842, \*2 n.4, \*5 (D.D.C. May 26, 1993) (mem. & order) (finding that *Lehman* was not applicable and that plaintiffs were not entitled to attorneys’ fees, where the Department of Justice “presented a colorable claim with at least some support in legal authority” and made a “good faith attempt to do its job in subtle and difficult areas of law.”). See generally Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Revoicing the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 900-901 & nn. 157-158 (listing federal court cases that have addressed executive non-enforcement).

<sup>16</sup> *Kendall*, 37 U.S. at 610-12.

<sup>17</sup> *Id.* at 613.

The three remaining Supreme Court cases are *Myers v. United States*,<sup>18</sup> *Freytag v. Commissioner*,<sup>19</sup> and *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>20</sup> *Myers* is also the most notable case cited by OLC in support of non-enforcement.<sup>21</sup> In *Myers*, the Court addressed whether President Woodrow Wilson had the constitutional authority to remove a postmaster, whom he appointed by and with the advice and consent of the Senate and whom he subsequently removed, notwithstanding an Act of Congress<sup>22</sup> that required the Senate's advice and consent prior to such a removal.<sup>23</sup> President Andrew Johnson had initially vetoed the law because he believed it to be an unconstitutional encroachment on the President's appointment and removal powers under Article II.<sup>24</sup> Fifty years later, the Court agreed with Johnson's constitutional conclusion and struck down the portion of the statute that restricted the President's removal power.<sup>25</sup>

*Myers* often is cited for the proposition that the Court implicitly approved of President Wilson's defiance of the Tenure in Office Act and, more exactly, that a President does not act improperly by refusing to comply with a "constitutionally objectionable statute" that has yet to come before an Article III court.<sup>26</sup> However, it is equally likely that the case "may suggest only that, if presented with an instance of executive non-enforcement, the Court will limit its review to the constitutionality of the statute at issue, and not consider whether the President acted properly in declining enforcement prior to a judicial ruling."<sup>27</sup>

In *Freytag*, the Court was presented with the question of whether Congress's grant of appointment authority to the Chief Judge of the United States Tax Court violated separation of powers.<sup>28</sup> The Court answered the question in the negative, and Justice Scalia (joined by

<sup>18</sup> 272 U.S. 52 (1926).

<sup>19</sup> 501 U.S. 868 (1991).

<sup>20</sup> 343 U.S. 579 (1952).

<sup>21</sup> See, e.g., 1994 Dellinger Memo, *supra* note 6, at 199; see also Memorandum from Attorney General Benjamin R. Civiletti to Senator Max Baucus, Chairman of the Senate Subcomm. on Limitations of Contracted & Delegated Authority on The Att'y Gen.'s Duty to Defend & Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980) [hereinafter 1980 Civiletti Memorandum] ("In my view, *Myers* is very nearly decisive of the issue you have raised.").

<sup>22</sup> Act of July 12, 1876, ch. 179, 19 Stat. 80, 81 ("Postmasters of the first, second, and third classes shall be appointed *and may be removed by the President by and with the advice and consent of the Senate*, and shall hold their offices for four years unless sooner removed or suspended according to law") (emphasis added) (*invalidated by Myers*, 272 U.S. at 107-108); *accord Myers*, 272 U.S. at 107-08.

<sup>23</sup> See *Myers*, 272 U.S. at 106-07 (discussing the underlying facts of the case and citing the relevant statute).

<sup>24</sup> See *id.* at 166 (citing *Parsons v. United States*, 167 U.S. 324, 340 (1897)).

<sup>25</sup> See *id.* at 176 ("[T]he Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.").

<sup>26</sup> Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 25 (2000).

<sup>27</sup> *Id.*

<sup>28</sup> *Freytag v. Comm'r*, 501 U.S. 868, 870 (1991).

Justices O'Connor, Kennedy, and Souter) concurred in part and concurred in the judgment.<sup>29</sup> About the constitutionally enshrined doctrine of separation of powers, Justice Scalia noted that

it was not enough simply to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including a separate political constituency, to which he alone was responsible, and the power to veto encroaching laws, or even to disregard them when they are unconstitutional.<sup>30</sup>

Finally, in *Youngstown Sheet*, the Court was “asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills.”<sup>31</sup> In his famous concurring opinion, Justice Jackson identified specific instances where the President can justifiably act contrary to an Act of Congress.<sup>32</sup> The third category delineating presidential power—when the President takes measures incompatible with the expressed or implied will of Congress<sup>33</sup>—is most germane to the debate surrounding non-enforcement. In his rationale for this presidential power, Justice Jackson cited to *Myers* to show that Congress implicitly sanctioned rare instances of this category in the past.<sup>34</sup>

The other cases dealing with this issue are all from circuit courts of appeals, and shed light on the judiciary’s views of a President’s power to ignore statutes. Professor Christopher May, discussed *infra* Part I.A.3, buttresses his case<sup>35</sup> against non-enforcement primarily with the

<sup>29</sup> *Id.* at 892 (Scalia, J., concurring in part and concurring in the judgment).

<sup>30</sup> *Id.* at 906 (citing Hon. Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 920-24 (1990)) (emphasis added).

<sup>31</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

<sup>32</sup> *Id.* at 635-38 (Jackson, J., concurring) (listing the following instances: when the President acts pursuant to an express or implied authorization of Congress; when the President acts in absence of either a congressional grant or denial of authority; and when the President takes measures incompatible with the expressed or implied will of Congress).

<sup>33</sup> *Id.* at 637-38.

<sup>34</sup> *See id.* at 638 (“However, his exclusive power of removal in executive agencies, affirmed in *Myers v. United States* . . . continued to be asserted and maintained.”).

<sup>35</sup> Professor May contends that “[n]o lower federal courts have held that a President may ignore laws he thinks are unconstitutional.” May, *supra* note 15, at 901 n.158. More astonishingly, May’s assertion that “[n]ot just federal judges who have addressed the issue have agreed that the Executive is obligated to enforce” congressional statutes is flatly contradicted by the case law he himself includes in the footnote used as support for the proposition. *See id.* (listing two cases that support his proposition, but then including two cases that reject his position).

Ninth Circuit's opinion in *Lear Siegler, Inc. v. Lehman*,<sup>36</sup> notwithstanding the case's subsequent procedural history that includes, importantly, the en banc court's withdrawal of the portion of the panel's opinion upon which Professor May relies.<sup>37</sup> Specifically, the panel addressed "the Executive Branch's constitutional challenge to legislation regulating procedures for the award of procurement contracts by federal agencies."<sup>38</sup> The Navy argued that the Competition in Contracting Act of 1984<sup>39</sup> was unconstitutional because it permitted the Comptroller General to decide the duration of suspensions or stays of government awards in the event a contract is protested, therefore granting to an officer of the legislative branch powers reserved only for executive branch officials.<sup>40</sup> The panel had the following information before it:

In a subsequent hearing before the House Judiciary Committee on April 18, 1985, Attorney General Edwin Meese expanded on this position by stating that the President has the duty to put his own interpretation of the Constitution ahead of any statute and obey it rather than the statute itself, and that, furthermore, the executive branch might not honor the CICA stay provisions until those were upheld by the Supreme Court.<sup>41</sup>

Before the court, the government reasserted the position it took before Congress, *i.e.*, "that the President's suspension of the [Act's] stay provisions is justified, because the President's duty to uphold the constitution and faithfully execute the laws empowers the President to *interpret* the Constitution and *disregard* laws he deems unconstitutional."<sup>42</sup> The panel disagreed with this interpretation, calling it "utterly at odds with the texture and plain language of the Constitution" and admonishing the government attorneys for "offer[ing] scant and extremely questionable support for [such a] dubious assertion of power."<sup>43</sup> The panel confronted the government's assertion head-on and stated that "[t]he 'line item veto' does not exist in the federal Constitution, and the executive branch cannot bring a *de facto* 'line item veto' into existence by promulgating orders to suspend parts of statutes which the

<sup>36</sup> 842 F.2d 1102 (9th Cir. 1988) (*Lehman I*), *withdrawn in part on other grounds on reh'g*, 893 F.2d 205 (9th Cir. 1989) (as amended, Jan. 10, 1990) (en banc) (per curiam).

<sup>37</sup> See *Lear Siegler, Inc. v. Lehman*, 893 F.2d 205, 206 (9th Cir. 1989) (*Lehman II*) (as amended, Jan. 10, 1990) (en banc) (per curiam) ("Accordingly, Part III of the decision published in [*Lear Siegler, Inc. v. Lehman*] is withdrawn from publication, and the judgment of the district court awarding attorney fees to Lear Siegler is reversed.").

<sup>38</sup> *Lehman I*, 842 F.2d at 1104.

<sup>39</sup> Competition in Contracting Act, 31 U.S.C. §§ 3551-3556 (1984).

<sup>40</sup> *Lehman I*, 842 F.2d at 1104.

<sup>41</sup> *Id.* at 1121.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



President has signed into law."<sup>44</sup> Thus, it is clear on what side of the argument the Ninth Circuit panel fell.<sup>45</sup>

In *Ameron, Inc. v. United States Army Corps of Engineers*,<sup>46</sup> the court (in dicta)<sup>47</sup> addressed the same statute<sup>48</sup> that was at issue in *Lehman I*.<sup>49</sup> The *Ameron* court acknowledged that the debate surrounded the President's assertion that "in the case of a conflict between the Constitution and a statute, the President's duty faithfully to execute the law requires him not to observe a statute that is in conflict with the Constitution . . ."<sup>50</sup> Reacting to this assertion of such power, the court characterized "[t]his claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional [as] dubious at best."<sup>51</sup>

Finally, in *United States v. Smith*,<sup>52</sup> an early opinion by Justice Paterson (sitting as Circuit Justice), the court expounded in detail on the purported power of the President to refuse to enforce statutes:

When it has become a law, . . . it is his duty to take care that it be faithfully executed. He cannot suspend its operation, dispense with its application, or prevent its effect . . . . If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature . . . .<sup>53</sup>

The court then answered the question of what remedies are available in the event that a President chooses not to enforce a particular law: (1) "his conduct may be the subject of inquiry before another

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<sup>44</sup> *Id.* at 1124.

<sup>45</sup> However, to the extent that an en banc court withdrew Part III of that opinion, this excerpt represents, at best, a useful piece of dictum for scholars on either side of the debate. See *Lear Siegler, Inc. v. Lehman*, 893 F.2d 205 (9th Cir. 1989) (en banc) (withdrawing the previous panel decision in part).

<sup>46</sup> 787 F.2d 875 (3d Cir. 1986), *aff'd on reh'g*, 809 F.2d 979 (3d Cir. 1986).

<sup>47</sup> See *id.* at 889 ("The question of the President's actions, declarations, and purported refusal to order compliance with CICA, however, was not properly before the district court. . . . We are faced with no justiciable claim against the President stemming from an alleged usurpation of power.").

<sup>48</sup> Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1984).

<sup>49</sup> See *May*, *supra* note 15, at 901 n.158 (citing the language in *Ameron* discussing the President's right to declare statutes unconstitutional and declaring it dicta).

<sup>50</sup> See *Ameron*, 787 F.2d at 889 (internal quotation marks omitted) (citing *Constitutionality of GAO's Bid Protest Function: Hearings Before the Subcomm. on Legislation and National Security of the H. Comm. on Government Operations*, 99th Cong., 1st Sess. 318 (1985) (testimony of Acting Deputy Attorney General D. Lowell Jensen)); see also Edwin Meese III, *President's Right to Challenge Law*, N.Y. TIMES, May 21, 1985 (Letter to the Editor).

<sup>51</sup> See *Ameron*, 787 F.2d at 889 (expressing disagreement with the asserted claim of right for the President to declare statutes unconstitutional and refuse to execute them).

<sup>52</sup> 27 F. Cas. 1192 (C.C.D.N.Y. 1806).

<sup>53</sup> *Smith*, 27 F. Cas. at 1203.

tribunal” or (2) “[i]f he has been guilty of crimes or misdemeanors, he is answerable upon an impeachment.”<sup>54</sup>

The gist of these seven cases—*Kendall*, *Myers*, *Freytag*, *Youngstown Sheet*, *Lehman*, *Ameron*, and *Smith*—is that the case law is conflicting. *Kendall*, even if its relevant portions are dicta, certainly weighs heavily in favor of those who argue that executive non-enforcement is simply not a constitutionally cognizable doctrine. However, *Myers* appears to cut in favor of non-enforcement. To be sure, *Myers* does not address the matter straight forwardly, but the Court easily could have commented on President Wilson’s defiant actions that directly contravened the statute at issue. That they did not may, as Professor Johnsen contends,<sup>55</sup> simply means that the Court was unwilling to address the issue at all. On the other hand, *Myers* could just as easily stand for the Court’s implicit approval of President Wilson’s actions.<sup>56</sup> Moreover, Justice Scalia’s concurrence in *Freytag* and Justice Jackson’s concurrence in *Youngtown Sheet* further suggest that some Justices in the past have assumed, if not implied, a presidential power of non-enforcement in limited instances. Finally, the three circuit court cases, *Lehman*, *Ameron*, and *Smith*, oppose any constitutional construction that grants the President the power not to enforce certain legislation. Thus, the available case law provides useful arguments for those on both sides of the argument.

## 2. OLC OPINIONS

The position of the President, as articulated through Office of Legal Counsel (OLC) opinions, can be synthesized from four memoranda written between 1980 and 1994: the 1980 Civiletti Memorandum,<sup>57</sup> 1990 Barr Memorandum,<sup>58</sup> 1992 Flanigan Memorandum,<sup>59</sup> and 1994 Dellinger Memorandum.<sup>60</sup> These memoranda have cited to one or more of the above-listed cases in support of executive non-enforcement.

### A. CIVILETTI MEMORANDUM

In 1980, Assistant Attorney General Benjamin Civiletti responded to eleven questions posed to him by Senator Max Baucus<sup>61</sup> regarding

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<sup>54</sup> *Id.* at 1204.

<sup>55</sup> Johnsen, *supra* note 26, at 25.

<sup>56</sup> See generally, e.g., 1994 Dellinger Memorandum, *supra* note 6, at 199.

<sup>57</sup> 1980 Civiletti Memorandum, *supra* note 21.

<sup>58</sup> 1990 Barr Memorandum, *supra* note 8.

<sup>59</sup> 1992 Flanigan Memorandum, *supra* note 8.

<sup>60</sup> 1994 Dellinger Memorandum, *supra* note 6.

<sup>61</sup> Senator Baucus was Chairman of the Senate Subcommittee on Limitations of Contracted and Delegated Authority.

the precedent, if any, of the DOJ's failure to enforce an Act of Congress. Civiletti had this to say:

I do not believe that the prerogative of the Executive is to exercise free and independent judgment on constitutional questions presented by Acts of Congress. At the same time, I think that in rare cases the Executive's duty to the constitutional system may require that a statute be challenged; and if that happens, executive action in defiance of the statute is authorized and lawful if the statute is unconstitutional.<sup>62</sup>

In support of this proposition, Civiletti cited *Myers v. United States* and stated that *Myers* held "that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts."<sup>63</sup> However, Civiletti quickly qualified his interpretation of *Myers* by reiterating that, in the rare cases where a President is justified in declining to enforce a statute, it is not the President but rather "the Constitution that dispenses with the operation of the statute."<sup>64</sup> Civiletti agreed "that the Executive can rarely defy an Act of Congress without upsetting the equilibrium established within our constitutional system," but he also stated that "if that equilibrium has already been placed in jeopardy by the Act of Congress itself, the case is much more likely to fall within that narrow class."<sup>65</sup> Civiletti described this "narrow class" of laws as ones that, by their very existence, shift the delicate balance of power enshrined in the Constitution. Civiletti noted that

[f]rom time to time Congress has attempted to limit the President's power to remove, and thereby control, the officers of the United States. Some of these attempts have been consistent with the Constitution; others have not. In every one of these instances, however, it was the Act of Congress itself that altered the balance of forces between the Executive and Legislative Branches; and if the Executive had invariably honored the Act, our constitutional system would have been changed by *fait accompli*.<sup>66</sup>

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<sup>62</sup> 1980 Civiletti Memorandum, *supra* note 21, at 59.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 60.

<sup>65</sup> *Id.* at 56.

<sup>66</sup> *Id.* at 56-57.

Finally, in response to Senator Baucus's query regarding past opinions of the Attorney General on which Civiletti relied, Civiletti cited to a 1942 opinion of Attorney General Francis Biddle<sup>67</sup> and the opinions to which Biddle cited therein.<sup>68</sup> From these opinions, Civiletti determined that "[n]one of them concludes that the Executive must enforce and defend every Act of Congress in every conceivable case . . . ."<sup>69</sup>

Thus, under Civiletti's views, the President is authorized to not enforce an Act of Congress only in two instances: when a statute is (1) transparently invalid<sup>70</sup> or (2) infringes on presidential power.<sup>71</sup>

## B. BARR MEMORANDUM

A decade after Civiletti drafted his memorandum, Assistant Attorney General William P. Barr responded to a request from the Counsel to the President for an opinion regarding whether President Bush could refuse to enforce 102(c) of the Foreign Relations Authorization Bill for fiscal years 1990 and 1991.<sup>72</sup> Barr answered in the affirmative and concluded that, because under the Take Care Clause an unconstitutional statute is not a law at all,<sup>73</sup> the President is not compelled to enforce it.<sup>74</sup> Moreover, Barr rejected "the argument that the President may not treat a law as invalid prior to a judicial determination but rather must presume it to be constitutional."<sup>75</sup> He continued and also stated that OLC consistently has rejected the argument "that the veto power is the only tool available to the President to oppose an unconstitutional law."<sup>76</sup> Moreover, Barr made clear that in addition to the Take Care Clause, "the oath to defend the Constitution allows the President to refuse to execute a law he believes is contrary to the supreme law, the Constitution."<sup>77</sup> "[P]residential decisions not to enforce a statute which

<sup>67</sup> Memorandum from Attorney General Francis Biddle to President Franklin D. Roosevelt on Political Activity by State or Local Employees, 40 Op. Att'y Gen. 158 (1942).

<sup>68</sup> See 1980 Civiletti Memorandum, *supra* note 21, at 60 (emphasizing the superseding obligation to Acts of Congress while holding that the President is not required to enforce the Acts of Congress in every conceivable case within the parameters of the Constitution).

<sup>69</sup> *Id.*

<sup>70</sup> Johnsen, *supra* note 26, at 23. For the first prong of this test, see 1980 Civiletti Memorandum, *supra* note 21, at 63 n.1 ("If an Act of Congress directs or authorizes the Executive to take action which is 'transparently invalid' when viewed in light of established constitutional law, I believe it is the Executive's constitutional duty to decline to execute that power.")

<sup>71</sup> Johnsen, *supra* note 26, at 23. For the second prong of this test, see 1980 Civiletti Memorandum, *supra* note 21, at 56 ("If that equilibrium [of the balance of separation of powers] has already been placed in jeopardy by the Act of Congress itself, the case is much more likely to fall within that narrow class.")

<sup>72</sup> 1990 Barr Memorandum, *supra* note 8, at 46.

<sup>73</sup> See THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("No legislative act, therefore, contrary to the Constitution, can be valid.")

<sup>74</sup> Barr Memorandum, *supra* note 8, at 47.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 48.

violates the separation of powers have been justified by the need to resist legislative encroachment."<sup>78</sup> Furthermore, Barr cited Chief Justice Chase and emphasized "that the President's obligation to defend the Constitution of the United States authorizes him to decline to enforce statutes which he believes are unconstitutional."<sup>79</sup> Additionally, Barr cited to James Wilson, a drafter of the Constitution and vocal advocate on its behalf, who stated during the Convention debates that "the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution."<sup>80</sup> Barr also referenced several past OLC opinions that supported the modern DOJ's views on non-enforcement.<sup>81</sup> Finally, in the last pages of the memorandum, Barr raises and then rejects the arguments that (1) the Take Care Clause precludes a President's decision not to enforce a statute, and (2) the President must always enforce a law he believes to be unconstitutional until a federal court declares the law to be unconstitutional.<sup>82</sup>

Thus, Barr more fully explores the case law and historical evidence that support non-enforcement, while he succinctly yet completely raises and then dismisses the two primary criticisms against non-enforcement. Although he did not provide a test to use to decide when a President may properly refuse to enforce a statute, Barr, like Civiletti, emphasized the narrowness of the doctrine and confined it only to such "legislation that infringes the separation of powers . . . ."<sup>83</sup>

### C. FLANIGAN MEMORANDUM

In 1992, Acting Assistant Attorney General Timothy E. Flanigan responded to a request for an opinion on the constitutionality of two laws<sup>84</sup> that purported to limit the number of passports the President

<sup>78</sup> *Id.* at 49.

<sup>79</sup> *Id.* at 48; see Letter from Chief Justice Chase to Gerrit Smith (Apr. 19, 1868), in *THE LIFE & PUBLIC SERVICES OF SALMON PORTLAND CHASE* 577, 578 (D. Appleton & Co., 1874) ("How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress sincerely believed by him to have been passed in violation of it?").

<sup>80</sup> Barr Memorandum, *supra* note 8, at 48 (citing 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 450 (Merrill Jensen ed. 1976) (statement of James Wilson on Dec. 1, 1787)).

<sup>81</sup> See *id.* at 49 (citing, *inter alia*, Letter from William French Smith, Att'y Gen., to Congressman Peter W. Rodino, Jr., at 3 (Feb. 22, 1985) and Letter from Benjamin R. Civiletti, Att'y Gen., to Congressman Thomas P. O'Neill, Jr., (Jan. 13, 1981)); see also *id.* at 50 (citing Recommendation That the Dep't of Justice Not Defend the Constitutionality of Certain Provisions of the Bankr. Amendments & Fed. Judgeship Act of 1984, 8 Op. Off. Legal Counsel 183, 195 (1984) ("[T]he President need not blindly execute or defend laws enacted by Congress if such laws trench on his constitutional power and responsibility.")).

<sup>82</sup> Barr Memorandum, *supra* note 8, at 50-51.

<sup>83</sup> *Id.* at 50.

<sup>84</sup> The first law at issue was Section 129(e) of the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, 105 Stat. 647 (1991). The second law at issue was Section 503 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Acts, 1992, Pub. L. No. 102-140, 105 Stat. 782 (1991).

could issue to United States government personnel.<sup>85</sup> Flanigan began by reiterating OLC's past opinions and emphasizing that "[a]mong the laws that the President must 'take Care' to faithfully execute is the Constitution."<sup>86</sup> Flanigan acknowledged that conflicts sometimes arise between a statute and the Constitution.<sup>87</sup> Most of Flanigan's analysis simply restated the arguments advanced by the Civiletti and Barr Memoranda; however, because *Freytag* had just recently been decided, Flanigan added Justice Scalia's concurrence to the body of available case law.<sup>88</sup> Moreover, unlike the Civiletti and Barr Memos, the Flanigan Memo directly addressed the jurisprudential elephant in the room, *Marbury v. Madison*.<sup>89</sup> For the President to continue to enforce a law he believed was unconstitutional until such time as a federal court could rule on the law's constitutionality "would subtly transform the proposition established in *Marbury v. Madison*—in deciding a case or controversy, the Judiciary must decide whether a statute is constitutional—to the fundamentally different proposition that a statute conflicts with the Constitution only when the courts declare so."<sup>90</sup>

Thus, the Flanigan Memorandum differs from both the Civiletti and Barr Memoranda in two important respects. First, it incorporates *Freytag*, which sheds light on the then-current views of Justices Scalia, O'Connor, Kennedy, and Souter. Second, the Flanigan Memorandum more directly challenges the understanding of the traditional rule from *Marbury*, *i.e.*, that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>91</sup> It is the second distinction that makes the Flanigan Memorandum sweep more broadly than either the Civiletti or Barr Memorandum.<sup>92</sup>

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<sup>85</sup> 1992 Flanigan Memorandum, *supra* note 8, at 18.

<sup>86</sup> *Id.* at 31.

<sup>87</sup> *Id.* at 31-32.

<sup>88</sup> *Id.* at 33. Flanigan noted that the *Freytag* majority did not disagree with Justice Scalia's conclusion that "'the means [available to a President] to resist legislative encroachment' upon his power included 'the power to veto encroaching laws, or even to disregard them when they are unconstitutional.'" *Id.* (quoting *Freytag*, 501 U.S. at 906) (Scalia, J., concurring in part and concurring in the judgment)); see also *id.* ("Justice Scalia's opinion is the latest in a long line of authority dating back to the framing of the Constitution.").

<sup>89</sup> Professors Eugene Gressman and Arthur Miller both criticized the doctrine of non-enforcement on multiple grounds, including that the doctrine was utterly at odds with the rule laid out in *Marbury*. See Flanigan Memorandum, *supra* note 8, at 35-36 (citing Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389 (1987) and *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House of Representatives Comm. on Gov't Operations*, 99th Cong., 1st Sess. 74 (1985) (statement of Professor Gressman)).

<sup>90</sup> 1992 Flanigan Memorandum, *supra* note 8, at 36 (emphasis in original).

<sup>91</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>92</sup> See Johnsen, *supra* note 26, at 16 (characterizing the Flanigan Memo as "describ[ing] presidential non-enforcement authority in sweeping terms").

## D. DELLINGER MEMORANDUM

Similar to Attorney General Civiletti's confinement of non-enforcement to a narrow category of cases, Assistant Attorney General Walter Dellinger likewise took a context-dependent approach.<sup>93</sup> Dellinger began his opinion by noting the "significant judicial approval" of non-enforcement,<sup>94</sup> and he continued by reiterating that the "consistent and substantial executive practice" also supports non-enforcement in certain situations.<sup>95</sup> Dellinger steadfastly defended the "unassailable" position that "in some situations the President may decline to enforce unconstitutional statutes . . ."<sup>96</sup> Dellinger further explained the appropriateness of the doctrine by concluding that because "[s]ome legislative encroachments on executive authority . . . will not be justiciable or are for other reasons unlikely to be resolved in court[,] . . . the President cannot look to a judicial determination, [and instead] must shoulder the responsibility of protecting the constitutional role of the presidency."<sup>97</sup> The 1994 Dellinger Memorandum makes clear that the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision.<sup>98</sup>

However, unlike his predecessors, Dellinger expounded on seven considerations upon which a President should rely when faced with the difficult decision of whether or not to enforce a statute.<sup>99</sup> These seven considerations form the broader structural framework from which the following three-part, multi-factor test is derived: (1) The President has an independent duty to protect and defend the Constitution, which includes the duty promptly to communicate his constitutional objections to a statute to Congress; and while he should presume the constitutionality of laws passed by Congress, he must still exercise his independent judgment in determining (a) if a statute is unconstitutional and (b) whether it is probable that the Court would agree with him.<sup>100</sup> (2) If he answers (1)(a) and (1)(b) in the affirmative, then he must next balance the effect of compliance on the rights of individuals and on his own presidential authority, giving special weight to whether the law purports to limit the President's Article II powers (especially his

<sup>93</sup> I have adopted Professor Johnsen's conclusion that both Civiletti and Dellinger use a "context-dependent approach" to non-enforcement. *See id.* at 25.

<sup>94</sup> 1994 Dellinger Memorandum, *supra* note 6, at 199 (citing to *Myers v. United States*, 272 U.S. 52 (1926), *Freytag v. Comm'r*, 501 U.S. 868 (1991), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring)).

<sup>95</sup> *Id.* (noting that "second, consistent and substantial practice confirms this general position.").

<sup>96</sup> *Id.* at 200.

<sup>97</sup> *Id.* at 201.

<sup>98</sup> *See id.* at 200.

<sup>99</sup> *Id.* at 200-03.

<sup>100</sup> *See* 1994 Dellinger Memorandum, *supra* note 6, at 200.

Commander in Chief powers).<sup>101</sup> Finally, (3) the fact that the President signed the very law he then declines to enforce does not change the analysis.<sup>102</sup>

### 3. THREE VIEWS FROM THREE SCHOLARS

Over the past twenty-five years, a small yet comprehensive body of scholarly literature on executive non-enforcement has emerged and continues to divide academics.<sup>103</sup> Three scholars representing three different viewpoints are outlined in this section.

#### A. PROFESSOR CHRISTOPHER N. MAY: MANDATORY ENFORCEMENT EXCEPT IN THE NARROWEST OF CIRCUMSTANCES

Professor Christopher May believes that executive non-enforcement harkens back to the English royal prerogative and is therefore anathema to the fundamental principles held by the Framers and enshrined in the Constitution.<sup>104</sup> According to Professor May, a President's decision to not enforce a statute is tantamount to his suspension of all or part of a duly enacted statute. Professor May argues that such an action by the President is indistinguishable from the royal prerogative of suspension of a law passed by Parliament.<sup>105</sup> It can be extrapolated from this conclusion that the President must enforce all congressional statutes even if he believes the statute violates the Constitution.<sup>106</sup> May supports his theory by harkening back to the intention of the Framers in creating a presidential veto power, as set forth in the *Federalist Papers*,<sup>107</sup> for the President to defend his department from promulgating unconstitu-

<sup>101</sup> See *id.* at 200-01.

<sup>102</sup> See *id.* at 202.

<sup>103</sup> See generally Prakash, *supra* note 4; Johnsen, *supra* note 26 (arguing for case-by-case approach); J. Randy Beck, Book Review, 16 CONST. COMMENT. 419 (1999) (reviewing CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE (1998)) (disagreeing with Professor May's categorization of executive non-enforcement as an extension of the British Crown's "royal prerogative"); May, *supra* note 15 (opposing the practice of presidential non-execution and likening the practice to a resurgence of the discretionary power of dispensation enjoyed by English monarchs at the time of the Constitution's ratification); see also Prakash, *supra* note 4, at 1617 n.20 (citing scholarship).

<sup>104</sup> See generally May, *supra* note 15 (espousing the belief that the Framers of the Constitution did not envision the President would have the power to suspend laws).

<sup>105</sup> See *id.* at 869 ("Presidential nonenforcement of 'unconstitutional' laws is equivalent to giving the Chief Executive a suspending power, one of the royal prerogatives exercised by the kings of England, which was wrested from the crown less than a century before the American Revolution."); see also *id.* at 893 ("The argument that a President may refuse to enforce laws he believes to be unconstitutional is but a reincarnation of the claimed royal prerogative of suspending the laws which was abolished in England by the Bill of Rights of 1689.").

<sup>106</sup> *Id.* at 878.

<sup>107</sup> THE FEDERALIST NO. 73, at 443, 445 (Alexander Hamilton) (Clinton Rossiter ed., New American Library 1961).



tional laws.<sup>108</sup> In instances where a law was passed during a previous administration, the President can ask Congress to repeal the law or, if that fails, he can refuse to defend the measure in the courts.<sup>109</sup>

However, May's rule does contain a narrow exception whereby the President may, consistent with the Constitution, refuse to enforce all or part of a statute.<sup>110</sup> He contends that the Framers envisioned judicial review of legislature as a check on the legislative process and, therefore, "[i]t would . . . not be incompatible with the original scheme for a President to ignore a clearly unconstitutional law if there is no other way for judicial review to occur."<sup>111</sup>

If placed on a spectrum, Professor May's views would be on one extreme end representing the view that non-enforcement is almost always unconstitutional.<sup>112</sup>

#### B. PROFESSOR DAWN E. JOHNSEN: A CONTEXT-DEPENDENT APPROACH TO NON-ENFORCEMENT

Professor Johnsen laments that although "[t]he existing literature is extensive and impressive[,] [m]ost commentators . . . find greater constitutional clarity than [she] believe[s] exists . . ."<sup>113</sup> In Johnsen's view, "the Constitution's text, history, and structure neither preclude nor authorize all presidential refusals to enforce constitutionally objectionable laws."<sup>114</sup> Johnsen favors a middle-of-the-road approach that acknowledges that the President must sometimes make "difficult evaluations that depend on the specific statutory provision and

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<sup>108</sup> *Id.* at 881.

<sup>109</sup> *Id.* at 969.

<sup>110</sup> *Id.* at 988 (explaining that the President may act in this way only if four principles are satisfied). The four principles that must be satisfied are: 1) the unconstitutionality of the law is clearly indicated from the text of the Constitution, the intent of the Framers, or prior rulings of the Supreme Court; 2) the President has exhausted all avenues for redressing the problem through the legislative process; 3) defiance of the law is the only way to bring the question of its constitutionality before the courts; and 4) the Executive must take all steps possible to ensure that judicial review actually occurs.

<sup>111</sup> *Id.* at 987.

<sup>112</sup> *See id.* at 867 (characterizing executive non-enforcement as "an alarming development . . . [that] threatens to further enhance the power of what already has many of the trappings of an Imperial Presidency"); *see generally* Beck, *supra* note 103, at 420-24 (challenging May's conclusions and stating that "May's argument loses steam . . . when applied to a President's good faith refusal to implement a statute on constitutional grounds.").

<sup>113</sup> Johnsen, *supra* note 26, at 10.

<sup>114</sup> *Id.* Presidential non-enforcement does not directly or invariably conflict with Congress's ability to pass legislation or the judiciary's responsibility to "say what the law is" in the context of resolving justiciable controversies. The President, for example, promotes implementation of the Supreme Court's pronouncements by declining to enforce laws that are indistinguishable from those the Court has held unconstitutional; and at least where Congress passed the laws prior to the Court's articulation of the constitutional rule and without consideration of the constitutional issue, non-enforcement does not inappropriately interfere with Congress's lawmaking power.

the circumstances surrounding its enactment.”<sup>115</sup> Johnsen rejects the argument that non-enforcement deprives the judiciary of its Article III powers to adjudicate appropriate cases.<sup>116</sup> But she is resolute in defending the proposition that a decision on the merits of a constitutional question by an Article III court ultimately trumps the President’s own constitutional conclusion.<sup>117</sup> Moreover, Johnsen also views the Take Care Clause not as affirmatively requiring non-enforcement, as was the position taken in the Civiletti OLC memoranda,<sup>118</sup> but instead as a limit on non-enforcement.<sup>119</sup>

Johnsen separates the existing scholarship into two camps: mandatory enforcement and routine non-enforcement.<sup>120</sup> She places Professor May<sup>121</sup> and the Ninth Circuit’s *Lehman* case in the first category and the 1992 Flanigan Memorandum in the second category.<sup>122</sup> Johnsen views those who subscribe to mandatory enforcement<sup>123</sup> as glossing over crucial historical and jurisprudential facts.<sup>124</sup> For example, for over 200 years the President and his legal advisers, as evidenced through countless opinions by Attorneys General and other appointees within the DOJ, have proven “that the President, too, is capable of principled constitutional interpretation.”<sup>125</sup> President Thomas Jefferson was the first President to refuse to enforce a law (the Sedition Act) that he viewed as

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<sup>115</sup> *Id.*

<sup>116</sup> *See id.* at 15 (“Article III does not confer on the federal courts exclusive authority to interpret the Constitution, and the President does not usurp judicial power by acting on his constitutional views in the course of exercising executive authority.”).

<sup>117</sup> *See id.* at 18 (equating judicial review of the President’s constitutional conclusions with judicial review of Congress’s constitutional conclusions, as was the issue in *Marbury*). Professor Johnsen rejects the views of Professor Michael Paulsen, who argues in the extreme that not only does the President have a duty not to enforce unconstitutional statutes, but he also must decline to enforce the judgment of an Article III court to the extent that the President’s constitutional views conflict with the court’s views. *See id.* (citing Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 340 (1994)).

<sup>118</sup> *See supra* Part II.A.

<sup>119</sup> Johnsen, *supra* note 26, at 16.

<sup>120</sup> *Id.* at 10.

<sup>121</sup> Professor Johnsen also includes in this category Professor Edward S. Corwin, whom I recognize is an authority in this area but on whom I have chosen not to expound for brevity’s sake. For a comprehensive view of Professor Corwin’s work, see generally EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (4th rev. ed. 1957).

<sup>122</sup> Johnsen, *supra* note 26, at 15-17. Also included in this second category is Judge Frank Easterbrook of the Seventh Circuit. *See id.* at 17-18. Moreover, if Professor Prakash’s article had been available at the time, Professor Johnsen undoubtedly would have included Prakash in the category of those supporting routine non-enforcement.

<sup>123</sup> *See* discussion *infra* Part I.A.3.a.

<sup>124</sup> *See* Johnsen, *supra* note 26, at 40-41 (indicating that Presidents have been able to engage in “principled constitutional interpretation” for two centuries).

<sup>125</sup> *Id.* at 40.

unconstitutional.<sup>126</sup> In addition to this historical support, Johnsen offers the more convincing argument that “[j]udicial doctrines of deference and justiciability often diminish the effectiveness of the courts in blocking unconstitutional laws . . . .”<sup>127</sup> Johnsen views these boundaries to Article III review as “reflecting, in part, the institutional limitations of the judiciary as well as the respect for the constitutional roles of the political branches.”<sup>128</sup>

Adopting the context-dependent approach typified in the 1994 Dellinger Memorandum, Johnsen proposes six questions that Presidents should ask themselves in deciding whether or not to enforce a particular statute.<sup>129</sup> Johnsen’s multi-factor approach adopts much of the same context-specific inquiries that distinguish the 1994 Dellinger Memorandum and, to a lesser degree, the 1980 Civiletti Memorandum.

### C. PROFESSOR SAI PRAKASH: ROUTINE NON-ENFORCEMENT

Professor Prakash falls on the other extreme of the debate by advocating for routine non-enforcement supported by a constitutional *duty* to act.<sup>130</sup> More exactly, Prakash argues “that the Constitution’s text and structure actually enshrine a duty to disregard federal statutes that violate the Constitution. That is to say, the President must take care *not to faithfully execute* unconstitutional laws.”<sup>131</sup> The crux of Prakash’s theory is that an unconstitutional law is void *ab initio* and is, there-

<sup>126</sup> See Memorandum to Abigail Adams (Sept. 11, 1804), in 8 THE WRITINGS OF THOMAS JEFFERSON 311 (Paul Leicester Ford ed., G.P. Putnam’s Sons 1897) (“But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution.”); accord Johnsen, *supra* note 26, at 20 (citing same).

<sup>127</sup> Johnsen, *supra* note 26, at 41.

<sup>128</sup> *Id.* at 42.

<sup>129</sup> *Id.* at 53.

1. How clear is the law’s constitutional defect?
2. Does the President possess institutional expertise relevant to resolving the constitutional issue, and what are the relative interpretive abilities of the three branches?
3. Did Congress actually consider the constitutional issue in enacting the law?
4. What is the likelihood of judicial review and how would non-enforcement affect that likelihood?
5. How serious is the harm that would result from enforcement?
6. Is repeal of the statute or non-defense of the statute against legal challenge an effective alternative to non-enforcement? As a preliminary matter, the President also should explore any available alternatives that would avoid the constitutional problem, including urging Congress to correct the problem before passage, adopting a saving construction of the provision, and considering the possibility of a veto.

<sup>130</sup> Professor Prakash distinguishes his approach from the approach taken by scholars who have adopted a multi-factor test, *e.g.*, Professor Johnsen. See Prakash, *supra* note 4, at 1626-27 (arguing that the multi-factor test is insufficient because “it conceives of Executive Disregard as a *discretionary* power to be wielded judiciously”) (emphasis added).

<sup>131</sup> *Id.* at 1629.

fore, not a law at all.<sup>132</sup> If, then, the statute is not a law, the Take Care Clause is not implicated.<sup>133</sup> Furthermore, “[i]f the President enforced unconstitutional statutes, he would be a participant in a constitutional violation,”<sup>134</sup> thereby violating his oath to uphold the Constitution.<sup>135</sup> Prakash’s primary intellectual qualm with those who advocate for discretionary non-enforcement is “that nothing in the Constitution seems to grant a discretionary disregard power.”<sup>136</sup> In other words, Prakash reads the presidential oath as imposing upon the President—and him alone—the grave duty to uphold the Constitution, a duty that “bars the President from violating the Constitution himself or aiding and abetting the violations of others . . . .”<sup>137</sup>

Obviously, such an expansive view of executive non-enforcement raises legitimate concerns about the limits of such power. Yet, Prakash answers these concerns by reassuring the skeptic that the President, in addition to facing political pressure from the people<sup>138</sup> in the event his constitutional conclusion is erroneous, also may face impeachment.<sup>139</sup> And if neither of those remedies proves readily available, “[t]he courts stand ready to hear cases accusing the President of disobeying a valid law (*assuming, of course, that someone has standing*).”<sup>140</sup>

Although some of his arguments merit consideration, Prakash’s proposed test to be employed by future Presidents leaves much to be desired:

When Presidents are unable to reach their own constitutional conclusions, however, they should disregard congressional statutes only when they conclude that there are reasons to believe that they would agree with others who have advised them that a statute is unconstitutional. More precisely, the President must have good reason to conclude that advice to disregard a statute is sound either because the President preliminarily reached the

<sup>132</sup> See *id.* at 1616 (“Far from vesting him with a discretionary Executive Disregard power, the Constitution actually *requires* the President to disregard unconstitutional statutes. This duty arises from three sources. First, the Constitution does not authorize the President to enforce unconstitutional laws. At the founding, such laws were seen as null and void, *ab initio*.”) (second emphasis added).

<sup>133</sup> See *id.* (“Because unconstitutional laws were nullities, they supplied no law for the President to enforce.”).

<sup>134</sup> *Id.* at 1629.

<sup>135</sup> *Id.* (arguing that this demonstrates that the Constitution’s text “enshrines” a duty to disregard federal statutes that the President believes violates the Constitution).

<sup>136</sup> *Id.* at 1630.

<sup>137</sup> *Id.* at 1632.

<sup>138</sup> See *id.* at 1638 (“[A]lthough the Constitution requires the Executive to defend the Constitution against unconstitutional laws, it also assumes that the people and Congress will hold him accountable for his decisions to disregard statutes he believes are unconstitutional.”).

<sup>139</sup> *Id.* at 1639 (admitting, however, that the President is likely to face impeachment only “[i]n particularly egregious cases”).

<sup>140</sup> *Id.* (emphasis added).

same conclusion or because, on a range of other legal questions, the President regards the interpreter as closely mirroring his own constitutional views.<sup>141</sup>

What constitutes “reasons to believe,” “good reason,” or “a range of other legal questions” is unclear. Instead, Prakash’s rather muddled and ambiguous standard only further underscores the inherent difficulties in proposing such an expansive view of executive non-enforcement.

### B. NON-DEFENSE

“[W]hen the Executive faces a law that he believes is unconstitutional, he must decide whether the law should be executed as written and defended if attacked . . . .”<sup>142</sup> A President may decline to defend laws that unconstitutionally infringe on his Article II powers or laws that are “clearly” or “patently” unconstitutional.<sup>143</sup> As long as a reasonable argument can be made in support of a law, the executive will continue to defend it.<sup>144</sup> However, not all plausible arguments are “reasonable” arguments.<sup>145</sup> Key to the DOJ’s decision not to defend a particular law is where “it is manifest that the President has concluded that the statute is unconstitutional.”<sup>146</sup> Aside from these general and informal guidelines, “[t]here exist no formal guidelines that the Attorney General, the Solicitor General[,] and other Department [of Justice] officials consult in making such decisions [not to defend].”<sup>147</sup> Although the executive branch once narrowly construed “clearly unconstitutional” when evaluating whether to defend a statute, the post-1980 construction has assumed a broader construction.<sup>148</sup> Similar to the doctrine of executive non-enforcement, the doctrine of executive non-defense appears in case law, OLC memoranda, and scholarship. However, each category is far less rich than in the area of non-enforcement.

<sup>141</sup> *Id.* at 1679-80.

<sup>142</sup> See Brady, *supra* note 3, at 972 (discussing former and current views of executive discretion over defense of statutes).

<sup>143</sup> 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, 606 (1997).

<sup>144</sup> Letter from Eric H. Holder, Jr., Att’y Gen., to the Hon. 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>.

<sup>145</sup> *Id.* at 5.

<sup>146</sup> *Id.* (quoting Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1083 (2001)).

<sup>147</sup> Letter from Andrew Fois, Assistant Att’y Gen., to Hon. Orrin G. Hatch, Chairman, at 7 (Mar. 22, 1996), available at <http://volokh.com/wp/wp-content/uploads/2011/02/DOJ1996.pdf> [hereinafter Fois Letter].

<sup>148</sup> See Brady, *supra* note 3, at 974-75 (“[A]s a practical matter, the executive branch has construed the authority to decline to defend [“clearly unconstitutional”] statutes . . . quite narrowly and, until recently, had exercised its discretion only once, in 1963, to challenge a separate-but-equal hospital financing provision of federal law.”).

## 1. CASE LAW

Initially, it should be noted that the Supreme Court has implicitly approved of executive non-defense in cases where executive power is implicated.<sup>149</sup> For purposes of this paper, however, the scope of the doctrine of non-defense is limited only to those cases in which the executive enforced, but declined to defend, legislation implicating individual rights.<sup>150</sup>

Prior to 1977, “the executive branch enforced, but did not defend, legislation infringing on individual constitutional rights in only two [cases]”:<sup>151</sup> *United States v. Lovett*<sup>152</sup> and *Simkins v. Moses H. Cone Memorial Hospital*.<sup>153</sup> In *Lovett*, the Court addressed the constitutionality of a provision of an appropriations bill that classified certain federal employees as dangerous and unfit for continued service.<sup>154</sup> President Roosevelt objected to the provision but signed the bill nonetheless in order to appropriate the necessary wartime funds.<sup>155</sup> However, Roosevelt refused to defend the law before the Supreme Court, so Congress authorized an *amicus curiae* to defend it.<sup>156</sup> Nothing in the *Lovett* Court’s opinion suggests that President Roosevelt acted improperly in deciding not to defend the provision before the Court.<sup>157</sup> President Roosevelt’s decision not to defend the law at issue in *Lovett* “implies that non-defense may be appropriate where the constitutionality of a statute is not a matter of

<sup>149</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (“Solicitor General Fried argued the cause for the United States as *amicus curiae* in support of appellees.”).

Of course, there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of this case in the absence of any participant supporting the validity of § 244(c)(2). The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress. We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.

*INS v. Chadha*, 462 U.S. 919, 940 (1983).

<sup>150</sup> This narrow scope is appropriate for the subsequent discussion of the decision not to defend DOMA, which does not threaten the President’s executive power. Furthermore, there is little guidance from the Supreme Court on the topic. See Gussis, *supra* note 143, at 607 (“Yet, in cases involving individual constitutional rights, Supreme Court guidance is often limited.”).

<sup>151</sup> *Id.*

<sup>152</sup> 328 U.S. 303 (1946).

<sup>153</sup> 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

<sup>154</sup> See *Lovett*, 328 U.S. at 315-18 (holding the Urgent Deficiency Appropriation Act, ch. 218, § 304, 57 Stat. 431, 450 (1943), unconstitutional, because it was a bill of attainder that punished three named individuals by depriving them of pay, without a judicial trial).

<sup>155</sup> *Id.* at 305 n.1 (noting that that President Roosevelt felt “that § 304 of the bill was unconstitutional”).

<sup>156</sup> See *id.* at 306 (“The Solicitor General, appearing for the Government, joined in the first two of respondents’ contentions but took no position on the third. House Resolution 386, 89 Cong. Rec. 10882, and Public Law 249, 78th Congress, 58 Stat. 113, authorized a special counsel to appear on behalf of the Congress.”).

<sup>157</sup> See *id.* at 305 n.1 (“As we shall point out, the President signed the bill because he had to do so since the appropriated funds were imperatively needed to carry on the war. He felt, however, that section 304 of the bill was unconstitutional, and failed to reappoint respondents.”); see Gussis, *supra* note 143, at 607.

clear, settled law.”<sup>158</sup> Thus, *Lovett* seems to “promote[] a lower threshold for presidential non-defense of statutes.”<sup>159</sup>

In *Simkins*, the Fourth Circuit (sitting en banc) was faced with a law modeled after a law previously struck down by the Supreme Court.<sup>160</sup> The United States moved to intervene and, “unusually enough, . . . joined the plaintiffs in [an] attack on the congressional Act and the regulation made pursuant thereto.”<sup>161</sup> Because the law at issue in *Simkins* was exactly like one that had already been held unconstitutional by the Supreme Court, *Simkins* presents a narrower standard for non-defense, *i.e.*, “there must be existing Supreme Court precedent on the constitutional issue before a President may decline to defend legislation.”<sup>162</sup>

Since 1977, every administration has declined to defend some statutes based on its constitutional objections.<sup>163</sup> Four cases illustrate this phenomenon:<sup>164</sup> *Turner Broadcasting Systems, Inc. v. F.C.C.*,<sup>165</sup> *League of Women Voters of California v. F.C.C.*,<sup>166</sup> *Gavett v. Alexander*,<sup>167</sup> and *Metro Broadcasting, Inc. v. F.C.C.*<sup>168</sup> In *Turner Broadcasting Systems*, President Bush ordered the DOJ not to defend Sections 4 and 5 (the “must-carry” provisions) of the Cable Television Consumer Protection and Competition Act of 1992 because Bush believed the sections violated the First Amendment.<sup>169</sup> President Bush had vetoed the Act, but it was passed over his objections.<sup>170</sup> Throughout litigation challenging the must-carry provisions, the DOJ appeared on behalf of the Federal Communications Commission (FCC) and declined to defend the provisions, citing President Bush’s veto message.<sup>171</sup> However, during the case’s pendency, President Clinton assumed office and instructed the DOJ to reverse course and defend the provisions.<sup>172</sup>

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<sup>158</sup> Gussis, *supra* note 143, at 608.

<sup>159</sup> *Id.*

<sup>160</sup> See *id.* (“The Supreme Court previously had ‘settled beyond question’ that the validity of state-supported racial discrimination was ‘foreclosed as a litigable issue.’”).

<sup>161</sup> *Simkins v. Moses H. Cone Mem’l Hosp.*, 323 F.2d 959, 962 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

<sup>162</sup> Gussis, *supra* note 143, at 608.

<sup>163</sup> See Fois Letter, *supra* note 147, at 7 (“In addition, it is worth noting several other cases in which the Department of Justice argued against the constitutionality of a statute in court . . . .”); *id.* at 7 n.12 (citing cases); see also Ball, *supra* note 4, at 77 n.1 (“Every recent administration has refused to defend some laws that it believed were unconstitutional.”).

<sup>164</sup> These cases are the same ones highlighted by Assistant Attorney General Andrew Fois in his letter to Chairman Hatch. Fois Letter, *supra* note 147.

<sup>165</sup> 819 F. Supp. 32 (D.D.C. 1993), *vacated by* 512 U.S. 622 (1994).

<sup>166</sup> 489 F. Supp. 517 (C.D. Cal. 1980).

<sup>167</sup> 477 F. Supp. 1035 (D.D.C. 1979).

<sup>168</sup> 497 U.S. 547 (1990).

<sup>169</sup> Fois Letter, *supra* note 147, at 6.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*; see also *id.* at 6 n.10 (citing court filings detailing the decision).

<sup>172</sup> Fois Letter, *supra* note 147, at 6.

In *League of Women Voters*, the Attorney General concluded the Public Broadcasting Act of 1967, which “prohibited noncommercial television licensees from editorializing or endorsing or opposing candidates for public office,”<sup>173</sup> was unconstitutional. The Attorney General believed that the law “violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge.”<sup>174</sup> The FCC, through the DOJ, informed the court that it would not defend the statute, so the Senate Legal Counsel appeared as *amicus curiae* on the Senate’s behalf.<sup>175</sup> While the district court’s decision in the case was on appeal, the new Attorney General (William F. Smith) reversed the Department’s decision and decided to defend the statute.<sup>176</sup> When the case finally reached the Supreme Court, the Court held that the statute violated the First Amendment.<sup>177</sup>

In *Gavett*, the DOJ concluded that a program in which the Army could sell surplus rifles only to members of the National Rifle Association (NRA) violated the Fifth Amendment’s equal protection guarantee because it could not satisfy even rational basis.<sup>178</sup> Once the DOJ informed the court of its intention not to defend, the court provided Congress with an opportunity to defend the law, which it declined to do; the NRA eventually defended the measure itself.<sup>179</sup> The court ultimately applied strict scrutiny and declared the law unconstitutional.<sup>180</sup>

Finally, in *Metro Broadcasting* the Acting Solicitor General appeared before the Court as *amicus curiae* to argue against the constitutionality of a statute that forbade the FCC to expend funds to evaluate its “longstanding policy of awarding preferences in licensing to broadcast stations with a certain level of minority ownership or participation.”<sup>181</sup> The Acting Solicitor General concluded that the statute violated equal protection, and the Senate Legal Counsel appeared as *amicus curiae* on the Senate’s behalf to defend the statute’s constitutionality.<sup>182</sup> Ultimately, the Court declared the statute to be constitutional.<sup>183</sup>

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<sup>173</sup> *Id.* at 5.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *supra* note 168.

<sup>178</sup> Fois Letter, *supra* note 147, at 5.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 4.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*



## 2. OLC OPINIONS

Little has come out of OLC directly related to executive non-defense.<sup>184</sup> Even in the most recent letter from Attorney General Holder to Speaker John Boehner regarding the administration's decision not to defend DOMA, the DOJ document cited in support of non-defense is the Fois Letter.<sup>185</sup> The Fois Letter was drafted for Senator Orrin Hatch in response to Hatch's "inquiries regarding the President's directive that the Department of Justice decline to defend section 567 of the National Defense Authorization Act for Fiscal Year 1996. . . ."<sup>186</sup> Fois admits in the letter that the DOJ gave oral advice to President Clinton, while memorializing none of it.<sup>187</sup> Quite simply, the Fois Letter makes clear that the decision not to defend is a rule in search of a standard.<sup>188</sup> Holder's letter to Boehner, which relies almost entirely on the Fois Letter, only strengthens this conclusion.

## 3. SCHOLARSHIP

Most scholarly articles in this area deal exclusively with non-enforcement, so the available literature is scant.<sup>189</sup> An often-cited 1983 law review article entitled *Executive Discretion and the Congressional Defense of Statutes*<sup>190</sup> describes the standard for non-defense as one where only "clearly unconstitutional" laws will go undefended by the executive.<sup>191</sup> However, the article's reason for selecting this standard is almost certainly because Attorney General Smith, in the *League of Women Voters* case discussed above, reversed the position of Attorney General Civiletti and, in doing so, stated that "the Department of Justice has the responsibility to defend acts of Congress unless they intrude on executive powers or are clearly unconstitutional . . . ."<sup>192</sup>

Over a decade later, another student note on the subject of non-defense addressed the doctrine in the context of President Clinton's decision not to defend the HIV provision of the 1996 National Defense Authorization Act.<sup>193</sup> According to this note, President Clinton's "determination not to defend the HIV provision marks the executive branch's

<sup>184</sup> See *id.* at 7 ("There exist no formal guidelines that the Attorney General, the Solicitor General and other Department officials consult in making such decisions.").

<sup>185</sup> See Letter to Speaker, *supra* note 144, at 5.

<sup>186</sup> Fois Letter, *supra* note 147, at 1.

<sup>187</sup> *Id.*

<sup>188</sup> See *id.* at 7 (admitting that there are no formal guidelines promulgated by the Department).

<sup>189</sup> Ball, *supra* note 4, at 77 n.7.

<sup>190</sup> See *supra* note 3.

<sup>191</sup> See *id.* at 979 ("Discretion to refuse to defend statutes is subject to abuse because it is difficult to define objectively what constitutes a 'clearly unconstitutional' statute.").

<sup>192</sup> See *id.* at 973 n.7 (discussing recognized exceptions to the executive obligation to defend statutes); accord Attorney General William French Smith, Press Release 5 (May 6, 1982).

<sup>193</sup> See Gussis, *supra* note 143, at 591.

first explicit assertion that such a decision faces a different, lower threshold than a decision not to enforce legislation."<sup>194</sup> The standard for non-defense employed by the Clinton administration is one where

the executive branch may decline to defend a statute in situations where it determines that the statute is “probably” unconstitutional. There need not be an existing court decision on the constitutional issue or arguments supporting only one side of the dispute. Under these circumstances, what legislation will be deemed “probably” unconstitutional becomes a question of leadership: the executive branch must conduct its own constitutional evaluation and determine which position is most “respectable.”<sup>195</sup>

Underlying this lower standard for non-defense is that “[s]uch evaluations appropriately reflect a President’s policy or political agenda.”<sup>196</sup> For example, President Clinton’s position that the statute in question was unconstitutional considered judicial precedent, the “policy goal of supporting HIV-positive troops as valuable members of the military[,] and a political agenda of catering to widespread public opposition to the ban.”<sup>197</sup> Gussis agrees with this lower threshold for non-defense and considers it “appropriate as a matter of law and policy.”<sup>198</sup>

Former Solicitors General have also weighed in on the debate. In 2001, Seth Waxman wrote that “[v]igorously defending congressional legislation serves the institutional interests and constitutional judgments of all three branches. . . . [by] ensur[ing] that proper respect is given to Congress’s policy choices. . . . [and by] preserv[ing] for the courts their historic function of judicial review.”<sup>199</sup> However, he went on to quote Solicitor General Bork, who spoke of the “betrayal of profound obligations to the Court and to Constitutional processes to take the simplistic position that whatever Congress enacts we will defend . . . .”<sup>200</sup> Moreover, Drew Days has noted that “[b]ecause both house of Congress now have the formal capacity to represent themselves in court, one could argue that the need for Solicitors General to presume the constitutionality of, and defend in court, the acts of Congress is less than it once was.”<sup>201</sup>

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<sup>194</sup> *Id.* at 604.

<sup>195</sup> *Id.* at 623-24.

<sup>196</sup> *Id.* at 624.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 638.

<sup>199</sup> Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1078 (2001).

<sup>200</sup> *Id.* at 1083 (citing Letter from Robert H. Bork, Solicitor Gen., to Simon Lazarus III (Aug. 5, 1975)).

<sup>201</sup> Drew S. Days, *In Search of the Solicitor General’s Clients: A Drama with Many Characters*, 83 Ky. L.J. 485, 502 (1994-1995).

## II. DOMA AND THE RECENT DECISION NOT TO DEFEND

In 1996, Congress passed and President Clinton signed into law the Defense of Marriage Act (DOMA).<sup>202</sup> The purpose of DOMA was “to create federal protection against the growing threat that legalization of same-sex marriage in one state would open the door for judges and other government officers to interpret federal law . . . as forcing other states and the federal government to recognize same-sex marriage.”<sup>203</sup> There are two operative sections in DOMA.

Section Two provides, in pertinent part, no state “shall be required to give effect to” same-sex marriage from any other state. Section Three provides, in relevant part, for purposes of federal law, “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife.”<sup>204</sup>

For purposes of this paper, only Section 3 will be explored.<sup>205</sup>

In 2004, the House Subcommittee on the Constitution held a hearing to evaluate DOMA in the wake of mounting political pressure.<sup>206</sup> Republican members of the subcommittee boasted that “[m]any experts believe that the Defense of Marriage Act should and will survive constitutional scrutiny.”<sup>207</sup> Most importantly, during the hearing, it was brought to the attention of members that “respected individuals” concluded that DOMA “could and will” be declared unconstitutional either under Justice Kennedy’s majority opinion in *Romer v. Evans* or the Court’s opinion in *Lawrence v. Texas*.<sup>208</sup> The hearing’s purpose was to explore the constitutionality of DOMA, and Chairman Chabot began his statement by “acknowledg[ing] that this has become a high profile and politically charged policy debate.”<sup>209</sup> Congress took no action to repeal DOMA, nor did the DOJ cease defending it in federal courts nationwide.<sup>210</sup>

However, on February 23, 2011, Attorney General Holder informed Speaker Boehner of the President’s and his decision to cease defense

<sup>202</sup> Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2006)).

<sup>203</sup> Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 *DRAKE L. REV.* 951, 959 (2010) (citing *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 28-32 (1996) (statement of Lynn D. Wardle, Professor, Brigham Young University)).

<sup>204</sup> *Id.* at 952 (citing 1 U.S.C. § 7).

<sup>205</sup> See generally *id.* at 956-58 (providing background information on the numerous functions of Section Three).

<sup>206</sup> *Defense of Marriage Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter 2004 DOMA Hearing].

<sup>207</sup> *Id.* at 1 (statement of Chairman Chabot).

<sup>208</sup> *Id.* at 2.

<sup>209</sup> *Id.*

<sup>210</sup> Letter to Speaker, *supra* note 144, at 1.

of DOMA in two pending cases<sup>211</sup> in the Second Circuit.<sup>212</sup> Unlike in the other federal circuits<sup>213</sup> that have addressed the appropriate level of scrutiny that applies to classifications based on sexual orientation, the issue is a matter of first impression in the Second Circuit.<sup>214</sup> Instead of arguing for rational basis review, “the President and [Holder] 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.”<sup>215</sup> Notwithstanding the “substantial circuit court authority applying rational basis,”<sup>216</sup> Holder argues that the arguments or precedents upon which those circuits relied are outdated.<sup>217</sup> In short, the law is old and the “scientific” arguments used to justify rational basis no longer hold up against modern science.<sup>218</sup>

The reactions in the legal community to the Obama administration’s decision not to defend DOMA were swift and divided.<sup>219</sup> On the political front, rhetoric from both sides of the aisle filled the halls of Congress, with some praising the decision and others, like Republican Congressman Lamar Smith (House Judiciary Committee Chairman), calling the decision not to defend DOMA “irresponsible,” “a transparent attempt to shirk the Department’s duty to defend the laws passed

<sup>211</sup> See *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); see also *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). As of the date of submission of this paper, December 9, 2011, both cases are still at the district court level, and no decision on the merits has been reached in either.

<sup>212</sup> Letter to Speaker, *supra* note 144, at 1.

<sup>213</sup> See *id.* at 3 (“To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications.”).

<sup>214</sup> See *id.* at 2.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 3.

<sup>217</sup> *Id.* (“Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate—a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003).”).

<sup>218</sup> *Id.*

<sup>219</sup> See, e.g., Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA*, 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/> (noting that “the Obama Administration has moved the goalposts of the usual role of the Executive branch in defending statutes”); Megan McArdle, *The Imperial Presidency*, THE ATLANTIC, Feb. 23, 2011, available at <http://www.theatlantic.com/business/archive/2011/02/the-imperial-presidency/71632/> (“I think it would be disastrous on a whole lot of levels if the GOP managed to undo ObamaCare with this sort of thing. But if the precedent stands, I think you can expect them to try it the next time they have the presidency.”); Valerie Richardson, *House GOP Eyes DOMA Defense Legal Void Left by Obama’s Move*, WASH. TIMES, Feb. 24, 2011, available at <http://www.washingtontimes.com/news/2011/feb/24/house-gop-eyes-doma-defense/?page=all> (“At the same time, the administration may have done opponents of same-sex marriage a favor by allowing the House to substitute lawyers who have no conflict about defending the law. Conservatives have complained about the Justice Department’s less-than-zealous legal defense.”); Tico Almeida, *President Obama Strengthens ENDA by Rejecting DOMA*, THE BILERICO PROJECT, (Feb. 26, 2011, 12:00PM), [http://www.bilerico.com/2011/02/president\\_obama\\_strengthens\\_enda\\_by\\_rejecting\\_doma.php](http://www.bilerico.com/2011/02/president_obama_strengthens_enda_by_rejecting_doma.php) (“For starters, the Obama Administration deserves credit for refusing to defend the constitutionality of the clearly discriminatory Section 3 of DOMA.”).

by Congress," and "disappointing."<sup>220</sup> And then there were admonishments, such as one blogger that asked "liberals": "If you think declining to defend DOMA is the right decision, how will you feel when a Republican administration declines to defend in a school prayer case? Or an abortion case? Or on Obamacare itself?"<sup>221</sup> For months after the decision was made, there were numerous blog posts, letters to the editor, and articles addressing the propriety of the decision.<sup>222</sup>

The House Subcommittee on the Constitution—still under Republican leadership—held a hearing in mid-April of 2011 to address the administration's decision.<sup>223</sup> Chairman Trent Franks began the hearing with this statement:

Now, it is true that past Presidents have declined to defend certain statutes that they in good faith determined were unconstitutional, but never has a President refused to defend a law of such public importance on a legal theory so far beyond any court precedent—and so clearly and transparently for political reasons.<sup>224</sup>

In reply, Congressman Jerrold "Jerry" Nadler (Ranking Member of Subcommittee on the Constitution of the House Judiciary Committee) eloquently and thoroughly chastised his Republican colleagues for spending valuable time and resources continuing to defend a law that is so patently irrational and discriminatory, and which "[t]he Congressional Record makes perfectly clear . . . is intended to express moral disapproval of gay men, lesbians, and their families."<sup>225</sup>

<sup>220</sup> DOJ Has a Responsibility to Defend DOMA, Press Release (Feb. 23, 2011), <http://judiciary.house.gov/news/2011/feb/110223DOMA.html> (statement of Chairman Smith).

<sup>221</sup> Jason Kuznicki, *The Non-Defense of DOMA*, CATO @ LIBERTY, (Feb. 24, 2011, 12:43PM), <http://www.cato-at-liberty.org/the-non-defense-of-doma/>.

<sup>222</sup> See generally Hans von Spakovsky, *The DOJ's Unprofessionalism in Its Attack on Traditional Marriage*, THE FOUNDRY, <http://blog.heritage.org/2011/07/07/the-doj%E2%80%99s-unprofessionalism-in-its-attack-on-traditional-marriage/> (July 7, 2011, 11:43AM) ("The Justice Department should not be sandbagging duly enacted federal laws in court because it disagrees with the policy."); see also David Ingram, *Potential Cost of Defending DOMA Goes Up*, NAT'L L.J., Oct. 4, 2011, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202517823705> (noting the price of hiring a former U.S. Solicitor General to defend DOMA could reach 1.5 million).

<sup>223</sup> *Defending Marriage, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong., 1st Sess. (Apr. 15, 2011) at 1 [hereinafter 2011 DOMA Hearing] (statement of Chairman Franks) ("The reason that we are here is that the Obama administration recently announced that it would no longer defend marriage.").

<sup>224</sup> *Id.* at 2.

<sup>225</sup> *Id.* at 7 (statement of Rep. Nadler, Ranking Member).

Since the decision not to defend,<sup>226</sup> two scholars have already published law review articles evaluating the decision.<sup>227</sup> Professor Carlos A. Ball agrees with the Obama administration's decision not to defend DOMA and proposes four factors that should guide future Presidents in analyzing the propriety of non-defense: "whether (1) there are binding judicial precedents on the relevant constitutional issues; (2) those issues raise significant normative and policy questions; (3) Congress considered the constitutional issues during the enactment process; and (4) it is likely that the President's decision will preclude judicial review."<sup>228</sup> Professor Robert J. Delahunty approves of the decision but thinks that the administration did not go far enough and that it should have declined to enforce Section 3.<sup>229</sup> In arriving at this conclusion, Delahunty adopts Professor Prakash's view of non-enforcement of unconstitutional laws being a duty—not a discretionary task.<sup>230</sup> This author favors the views of Professor Ball over those of Professor Delahunty, as will be discussed in Part III.

### III. THE DECISION TO CONTINUE TO ENFORCE DOMA WAS PROPER

President Obama's decision to continue to enforce DOMA while declining to defend it in the Second Circuit was proper. I arrive at this conclusion using a two-step analysis: (1) was the decision to continue to enforce proper? If it was proper, (2) was the President still justified in declining to defend the law before the Second Circuit?

#### A. THE CIVILETTI-DELLINGER TEST FOR NON-ENFORCEMENT

The two-prong test established in the Civiletti Memorandum most closely comports with the doctrine of separation of powers enshrined in

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<sup>226</sup> Since this article was written, but prior to publication, Attorney General Holder announced that the Department of Justice would not defend 38 U.S.C. § 101(3) and (31). See Letter to Speaker, *supra* note 144. Both of these sections deal with the definition of "spouse" in the context of military veterans' benefits. 38 U.S.C. § 101(3), (31) (defining "spouse" as "a person of the opposite sex"). *Id.*

Significantly, this is the first time that the administration has declined to defend the definition of "spouse" within the military context. Using the same rationale as the administration's prior decision not to defend Section 3 of DOMA, Attorney General Holder informed Speaker Boehner that the definition's exclusion of same-sex individuals fails the "heightened scrutiny" standard of constitutional review. See Letter to Speaker Boehner (Feb. 17, 2012). The case is *McLaughlin v. Panetta*, 11-11905 (D. Mass.). The district court has stayed the case for 60 days to give Congress time to defend those provisions. Thus, the next deadline for filing a responsive pleading and response to plaintiffs' motion for SJ is April 28th.

<sup>227</sup> Ball, *supra* note 4; Robert J. Delahunty, *The Obama Administration's Decisions to Enforce, but Not Defend, DOMA* § 3, 106 Nw. U. L. REV. COLLOQUY 69 (2011).

<sup>228</sup> Ball, *supra* note 4, at 79.

<sup>229</sup> See Delahunty, *supra* note 227, at 75 ("Given the strength of the Administration's constitutional convictions concerning § 3, it is inexcusable for the Administration to continue to enforce it.")

<sup>230</sup> See *id.* at 71 ("I believe that Prakash is correct. In addition to Prakash's powerful textual and structural reasons, sound policy supports his claims.")

the Constitution.<sup>231</sup> Under Civiletti's view, the President is authorized not to enforce an Act of Congress only if the statute is (1) transparently invalid<sup>232</sup> or (2) infringes on presidential power.<sup>233</sup> If the statute falls in the second category, then the next step should be to continue to the three-prong test established in the Dellinger Memorandum,<sup>234</sup> which derives from the seven considerations mentioned by Dellinger.<sup>235</sup> If, however, the statute falls in the first category and is "transparently invalid," then the analysis should be simply whether the law is substantially similar to a law that the Supreme Court has previously held to be unconstitutional.<sup>236</sup> If the statute in question fits in neither category, then the President must continue to enforce the law until it is declared unconstitutional by a federal court.

Adding Dellinger's multi-factor test as an additional analytical step to the decision not to enforce statutes implicating presidential power hopefully will assuage the fears of those like Professor Johnsen who oppose the broad construction of executive non-enforcement represented by the Flanigan Memorandum, while appeasing scholars like Professor May who are concerned with presidential abuse of power.<sup>237</sup>

<sup>231</sup> See 1980 Civiletti Memorandum, *supra* note 21, at 56 ("[I]f executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, their conduct in office could jeopardize the equilibrium established within our constitutional system.").

<sup>232</sup> Johnsen, *supra* note 26, at 23. For the first prong of this test, see 1980 Civiletti Memorandum, *supra* note 21, at 63 n.1, ("[i]f an Act of Congress directs or authorizes the Executive to take action which is 'transparently invalid' when viewed in light of established constitutional law, I believe it is the Executive's constitutional duty to decline to execute that power.").

<sup>233</sup> Johnsen, *supra* note 26, at 23. For the second prong of this test, see 1980 Civiletti Memorandum, *supra* note 21, at 56, ("[I]f that equilibrium [of the balance of separation of powers] has already been placed in jeopardy by the Act of Congress itself, the case is much more likely to fall within that narrow class.").

<sup>234</sup> See 1994 Dellinger Memorandum, *supra* note 6, at 201 (Allowing for the possibility for the President to refuse to enforce a law that infringes on his power ensures that the President is not powerless against those "legislative encroachments on executive authority [that] . . . will not be justiciable or are for other reasons unlikely to be resolved in court . . .")

<sup>235</sup> See *supra* Part I.A.2.:

(1) The President has an independent duty to protect and defend the Constitution, which includes the duty promptly to communicate his constitutional objections to a statute to Congress; and while he should presume the constitutionality of laws passed by Congress, he must still exercise his independent judgment in determining (a) if a statute is unconstitutional and (b) whether it is probable that the Court would agree with him. (2) If he answers (1)(a) and (1)(b) in the affirmative, then he must next balance the effect of compliance on the rights of individuals and on his own presidential authority, giving special weight to whether the law purports to limit the President's Article II powers (especially his Commander in Chief powers). Finally, (3) the fact that the President signed the very law he then declines to enforce does not change the analysis.

<sup>236</sup> Cf. 1980 Civiletti Memorandum, *supra* note 21, at 59 ("I think that in rare cases the Executive's duty to the constitutional system may require that a statute be challenged; and if that happens, executive action in defiance of the statute is authorized and lawful if the statute is unconstitutional.").

<sup>237</sup> See *id.* at 56 ("[T]he Executive can rarely defy an Act of Congress without upsetting the equilibrium established within our constitutional system, [but]if that equilibrium has already been placed in jeopardy by the Act of Congress itself, the case is much more likely to fall within that narrow class.").

Moreover, allowing the President to decline to enforce “transparently invalid” laws using a different, albeit equally demanding, standard leaves the President able to thwart congressional attempts at ignoring or circumventing Supreme Court precedent. Furthermore, in the case of a statute that falls in either category, Professor Prakash’s understanding of the Take Care Clause as mandating that a President *not* enforce certain laws would provide useful guidance by illustrating why the President must decline to enforce a statute at all. Finally, this test represents more of a middle-of-the-road approach because it allows for non-enforcement in more circumstances than would Professor May,<sup>238</sup> but in fewer circumstances than would Professor Prakash.<sup>239</sup> This standard, a hybrid of the approach of Civiletti and Dellinger, will be called the Civiletti-Dellinger test.

### B. APPLYING THE CIVILETTI-DELLINGER TEST TO DOMA

The application of the Civiletti-Dellinger test to the decision to continue to enforce DOMA is straightforward. First, DOMA is not “transparently invalid,” for the Supreme Court has yet to rule on its constitutionality. Second, DOMA does not implicate presidential power. Therefore, because DOMA fits in neither category of the Civiletti-Dellinger test, the President must continue to enforce it until a federal court declares it unconstitutional.

### C. THE “PROBABLY UNCONSTITUTIONAL” MULTI-FACTOR TEST FOR NON-DEFENSE

Defending a law so long as a “reasonable argument” can be made for its constitutionality is a nebulous and unhelpful standard. Reasonable minds often will differ when it comes to what is a “reasonable” argument; some will even go so far as to play semantics by differentiating a “reasonable” argument from a merely “plausible” one.<sup>240</sup> Replacing this standard with one more focused on the constitutionality of the law itself helps place the debate back where it belongs—grounded in the Constitution. According to Gussis, the “probably unconstitutional” standard was first used by the Clinton Administration in its decision not to defend the HIV provision of the 1996 defense authorization bill.<sup>241</sup> I propose essentially the same test, but with the addition of four factors that should be balanced in the analysis in order to decide whether the law, in fact, is more likely than not unconstitutional.

<sup>238</sup> See May, *supra* note 15, at 988 (listing four factors that must be satisfied before a President may refuse to enforce a statute).

<sup>239</sup> See Prakash, *supra* note 4, at 1679-80 (arguing that Presidents should not enforce congressional statutes whenever they are “confident” that the statute is unconstitutional).

<sup>240</sup> Letter to Speaker, *supra* note 144, at 5.

<sup>241</sup> Gussis, *supra* note 143, at 608.



“Probably unconstitutional” is best understood in terms of the standard for the burden of proof in civil trial, *i.e.*, a preponderance of the evidence. Therefore, if the President determines that it is more than fifty-percent likely that a law violates the Constitution, then he may refuse to defend, or cease defending, the law. In arriving at his answer, however, the President should consider the following factors: (1) Has new Supreme Court precedent likely changed the applicable constitutional analysis as applied to the law? (2) Has a lower federal court recently either called the law into question or directly addressed its constitutionality? (3) Does the President, relying on his own constitutional judgment and on the opinion of the DOJ, conclude that the law is unconstitutional? (4) Does the passage of the law pre-date the President’s term in office such that he did not have an opportunity to veto it? At a minimum, two of the four questions should be answered in the affirmative in order for the President to confidently assert that the law is “probably unconstitutional”; however, an affirmative answer to either Question (1) or Question (2), without more, may suffice.

#### **D. APPLYING THE “PROBABLY UNCONSTITUTIONAL” MULTI-FACTOR TEST TO DOMA**

Applying this standard to DOMA, the President would have arrived at the same conclusion as with application of the “no reasonable argument” standard. To begin with, all four questions of the multi-factor test can be answered in the affirmative. First, as Attorney General Holder’s letter makes clear, *Lawrence v. Texas* and *Romer v. Evans* likely changed the constitutional analysis regarding laws discriminating against same-sex individuals.<sup>242</sup> Second, two federal district court cases recently have declared Section 3 of DOMA unconstitutional.<sup>243</sup> Third, the President and the Attorney General each have concluded that Section 3 of DOMA is unconstitutional.<sup>244</sup> Finally, the President did not have an opportunity to voice his constitutional concerns during the passage of the law, thereby precluding him from taking advantage of the President’s most powerful tool of constitutional judgment—the veto.<sup>245</sup> Thus, applying the “probably unconstitutional” multi-factor test, the decision not to defend Section 3 of DOMA was proper.

<sup>242</sup> Letter to Speaker, *supra* note 144, at 3.

<sup>243</sup> See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (“DOMA fails to pass constitutional muster even under the highly deferential rational basis test.”); *Massachusetts v. U.S. Dep’t. of Health & Human Servs.*, 698 F. Supp. 2d 234, 234 (D. Mass. 2010) (holding DOMA violates Spending Clause and Tenth Amendment).

<sup>244</sup> Letter to Speaker, *supra* note 144, at 5 (“The President has also concluded that Section 3 of DOMA . . . is therefore unconstitutional.”).

<sup>245</sup> See 1980 Civiletti Memorandum, *supra* note 21, at 58 (“The Framers gave the President a veto for the purpose, among others, of enabling him to defend his *constitutional* position.”).

### CONCLUSION

Recently, the Obama administration's decision to continue to enforce, but not defend, Section 3 of DOMA has sparked controversy in the legal academy and in the Halls of Congress. Such a decision, while not unusual, certainly does not occur every day. The Obama administration's recent decision has reignited the debate on the propriety of executive non-enforcement and non-defense.

This paper has briefly surveyed most of the relevant case law, OLC opinions, and scholarship addressing the sister doctrines of executive non-enforcement and executive non-defense. Although much has been written about non-enforcement, substantially less attention has been paid to non-defense. A combination of case law, OLC opinions, and scholarship suggests that multiple standards of non-enforcement currently exist, but none seems to best address the criticisms often levied at supporters of non-enforcement. Furthermore, what has been written about non-defense does not provide a clear standard. I propose a new standard for each: the "Civiletti-Dellinger" test for non-enforcement and the "Probably Unconstitutional" test for non-defense. When each standard is applied to the DOMA decision, I conclude that Obama properly continued to enforce Section 3 of DOMA while simultaneously declining to defend it in the courts.

This paper has offered only an introduction to an historically complicated, politically charged, and standardless area of constitutional law that would be well served by some doctrinal clarity and fresh perspectives. I am certain that more will be written on this topic in the coming months, and I look forward to seeing if my take on the issue is shared, at least in part, by anyone else.