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Volume 62

Issue 4 *The 2012 Randolph W. Throver Symposium – Innovation for the Modern Era: Law, Policy, and Legal Practice in a Changing World*

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2013

## Whose Defense is it Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes

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### Recommended Citation

Simon P. Hansen, *Whose Defense is it Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes*, 62 Emory L. J. 1159 (2013).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol62/iss4/11>

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# WHOSE DEFENSE IS IT ANYWAY? REDEFINING THE ROLE OF THE LEGISLATIVE BRANCH IN THE DEFENSE OF FEDERAL STATUTES

## ABSTRACT

*When the Obama Administration announced it would cease defending the Defense of Marriage Act (DOMA) in litigation, it demonstrated the increasing fluidity inherent in the Executive Branch custom of defending federal statutes. After three years of setting aside its opposition to DOMA, the Administration adopted a newfound interpretation of DOMA's Section Three and abruptly abandoned its defense. While the House Bipartisan Leadership Advisory Group eventually undertook the law's defense, it met obstacles in finding a litigant on its behalf. Partisan opposition to the Advisory Group's decision to defend DOMA and a prominent U.S. law firm withdrawing its representation jeopardized the law's defense.*

*The circumstances surrounding DOMA show the vulnerability of laws enacted by Congress. While the Executive Branch has often used its enforcement powers to exert control over the effects of certain laws, recent decades have also seen it utilize its status as the primary defender of the interests of the United States to sidestep laws with which it disagrees. As statutes face constitutional legal challenges, the Executive Branch has increasingly refrained from defending statutes.*

*This Comment argues that the Legislative Branch should undertake the primary role in statutory defense to stop the detrimental effect that the nondefense of statutes has on the separation of powers. This Comment contends that defending federal statutes is not within the President's Article II powers, and that a growing trend toward departmentalism supports the Legislative Branch's ability to argue its own interpretation of a law's constitutionality. As such, this Comment proposes a new Legislative Branch office charged with the primary responsibility of defending federal statutes and describes how such a change could occur.*

## INTRODUCTION

“After careful consideration . . . the President of the United States has made the determination that Section 3 of the Defense of Marriage Act (“DOMA”), as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment.”<sup>1</sup> Though vowing to continue the enforcement of DOMA,<sup>2</sup> this declaration ended the Obama Administration’s begrudging defense<sup>3</sup> of the law.<sup>4</sup> As pundits debated the political ramifications of President Obama’s decision, the lesser discussed, but arguably most important, issue was the emerging trend of the Executive Branch refusing to defend the constitutionality of federal statutes challenged in litigation.

The difficulty in responding to this trend is heightened by the fact that the constitutional parameters of the Executive Branch’s defense of statutes have yet to be firmly established.<sup>5</sup> While the practice has existed for over 140 years,<sup>6</sup> the evolution of constitutional interpretative theory among the three branches of government has confounded the once-shared understanding of how statutes are to be defended.<sup>7</sup> Indeed, the move from a strict adherence to judicial supremacy to a broad acceptance of departmentalism<sup>8</sup> has contributed

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<sup>1</sup> Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives, *Litigation Involving the Defense of Marriage Act* (Feb. 23, 2011) [hereinafter *Attorney General’s Letter*] (citation omitted), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>2</sup> Defense of Marriage Act, 1 U.S.C. § 7 (2006).

<sup>3</sup> See Lindsey Ellerson, *Obama Justice Department Defends Defense of Marriage Act—That Candidate Obama Opposed*, ABC NEWS (June 12, 2009, 7:00 PM), <http://abcnews.go.com/blogs/politics/2009/06/obama-justice-department-defends-defense-of-marriage-act-that-candidate-obama-opposed>.

<sup>4</sup> Attorney General’s Letter, *supra* note 1. In addition to the Obama Administration deciding not to defend DOMA in two cases that arose in the Southern District of New York and the District of Connecticut, the Attorney General also stated explicitly in this letter that he would “instruct Department attorneys to *advise courts in other pending DOMA litigation* of the President’s and my conclusions that . . . Section 3 is unconstitutional under [heightened scrutiny] and that the Department will cease defense of Section 3.” *Id.* (emphasis added).

<sup>5</sup> Compare Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 970 (1983) [hereinafter *Executive Discretion*] (arguing that the responsibility to defend statutes is inferred from the President’s duty to faithfully execute the laws), with Dalena Marcott, Note, *The Duty to Defend: What Is in the Best Interests of the World’s Most Powerful Client?*, 92 GEO. L.J. 1309, 1312 (2004) (suggesting that the duty to defend statutes has been voluntarily accepted by the Department of Justice throughout the history of the Office of the Solicitor General).

<sup>6</sup> The practice can be traced back to 1870 and the establishment of the Department of Justice, which included the Office of the Solicitor General. See Act of June 22, 1870, ch. 150, §§ 1–2, 16 Stat. 162, 162.

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part II.A. While discussed later in this Comment, the term *departmentalism* refers to the idea that each of the three branches of government possesses the authority to render constitutional interpretations.

to the increasingly common occurrence of one branch declaring the actions of the others to be unconstitutional.<sup>9</sup> Simultaneously, the general electorate and media's understanding of each branch's functions imposes political pressure and impedes the responses of each branch to such declarations.<sup>10</sup> The result has been an ad hoc system of statutory defense that has muddled the question of whether and how a statute receives a defense.<sup>11</sup> Within this context, the need to examine alternative methods of statutory defense becomes necessary to maintain a proper separation of powers.

This Comment puts forth the argument that the duty to defend federal statutes in litigation should rest predominantly with the Legislative Branch. While many have addressed the practice as it has developed and persisted within the Executive Branch,<sup>12</sup> the belief that the Legislative Branch should replace the Executive Branch as the primary defender in such litigation has received minimal attention.<sup>13</sup> Admittedly, it would be very difficult for this idea to overcome and replace the existing practices and customs that have become entrenched throughout recent decades. However, the objective of expressing the argument is to serve as an impetus for creating more effective and efficient statutory defenses. This Comment recognizes the increasing frequency with which the Executive Branch refuses to defend statutes based on its belief that the statutes are unconstitutional,<sup>14</sup> and it offers a potential solution that meets the political and institutional prerogatives of each branch.

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<sup>9</sup> Seth P. Waxman, Essay, *Defending Congress*, 79 N.C. L. REV. 1073, 1073–74 (2001).

<sup>10</sup> See Chrysanthe Gussis, Note, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. MICH. J.L. REFORM 591 (1997) (describing the effect of public opinion in support of President Clinton's nondefense of the HIV provision, leading Congress to quickly repeal the law).

<sup>11</sup> Currently, federal law permits the Office of Legal Counsel for either the Senate or House of Representatives to intervene or appear as amicus curiae *only* in legal actions or proceedings in which the powers and responsibilities of Congress are placed in issue, and *only* after being directed to do so. See Ethics in Government Act of 1978 § 706, 2 U.S.C. § 288e (2006). The law does not require that they intervene, however, and whether they do so remains unpredictable and is determined on a case-by-case basis. See *id.*

<sup>12</sup> See, e.g., Drew S. Days III, Lecture, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 499 (1994–1995); Waxman, *supra* note 9, at 1073; *Executive Discretion*, *supra* note 5; Marcott, *supra* note 5, at 1309.

<sup>13</sup> See Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914 (2012); see also James W. Cobb, Note, *By "Complicated and Indirect" Means: Congressional Defense of Statutes and the Separation of Powers*, 73 GEO. WASH. L. REV. 205, 224 (2004) (arguing against the Office of Senate Legal Council intervening to defend statutes).

<sup>14</sup> See Tony Mauro, *Duty to Defend? Not Always*, NAT'L L.J. (Oct. 25, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202473803028> (indicating that, since 2006, the Executive Branch has declined to defend a statute based on its perceived unconstitutionality at least thirteen times).

Part I shows that the defense of statutes is *not* encompassed by the President's executive powers. Part I distinguishes the enforcement and defense of laws by explaining how the act of defending statutes arose within the Executive Branch out of tradition rather than constitutional authority. Accordingly, Part I illustrates that Congress may undertake the defense of statutes without intruding on executive powers.

Part II describes the evolution of constitutional theory from its former adherence to judicial supremacy to its current acceptance of departmentalism. Part II examines the effect this shift has had on the defense of statutes and compares past examples of Executive Branch nondefense to President Obama's recent decision not to defend DOMA. Part II illustrates how the Obama Administration's DOMA decision differed from previous presidential decisions to not defend federal statutes, and it explains how departmentalism further justifies the abandonment of the current tradition of Executive Branch defense of statutes in favor of Legislative Branch statutory defense.

Part III addresses the primary objection that the Legislative Branch defense of statutes would violate the anti-aggrandizement principle upheld in *Bowsher v. Synar*.<sup>15</sup> Anticipating the counterargument that calling for Congress to defend statutes would encroach upon Executive Branch powers,<sup>16</sup> Part III dispels this notion and argues that the ability to defend statutes exists within the inherent powers of Congress.

Part IV then provides a model in which a Legislative Branch office, mirroring the functions and institutional responsibilities of the Solicitor General, serves as the more appropriate actor to defend acts of Congress. Though the proposed model cuts against the traditional Executive Branch role in defending statutes, Part IV demonstrates how allowing a Legislative Branch official to defend the constitutionality of Congress's own laws will better ensure more zealous representation of statutes and strengthen the institutional and political interests of the Legislative and Executive Branches.

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<sup>15</sup> See 478 U.S. 714, 726 (1986) (holding that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment").

<sup>16</sup> See U.S. CONST. art. II, § 1, cl. 8 (requiring the President to swear or affirm to "preserve, protect and defend the Constitution"); *id.* § 3 (requiring the President to "take Care that the Laws be faithfully executed").

## I. DISTINGUISHING STATUTORY ENFORCEMENT FROM DEFENSE

Congress ought possess the primary role in defending the constitutionality of federal statutes. To obviate separation-of-powers objections this idea may pose, this Part illustrates that statutory defense falls outside the scope of Executive Branch enforcement powers. This Part establishes the differences between enforcing and defending a statute and when the Executive Branch may become involved with a statute's defense. It then explains how the Executive Branch emerged as the default actor in regard to defending statutes. Finally, it outlines recognized exceptions the Executive Branch has created to justify instances when it has abandoned its tradition of defending statutes.

### A. *Separating Statutory Defense from Article II Duties*

Article II of the Constitution bestows upon the President duties to “take Care that the Laws be faithfully executed”<sup>17</sup> and to “preserve, protect and defend the Constitution of the United States.”<sup>18</sup> Together, these duties require that the President execute<sup>19</sup> the laws passed by Congress insofar as doing so does not violate the Constitution.<sup>20</sup> Though the ideas of *executing* and *defending* laws often get conflated with each other, the two are not the same.<sup>21</sup> The two practices remain very distinct, and the differences between the two become tangible in actual application.

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<sup>17</sup> *Id.* § 3.

<sup>18</sup> *Id.* § 1, cl. 8.

<sup>19</sup> The words *execute* and *enforce* are used synonymously throughout this Comment, with no distinction intended between the two. A comparison of the legal definitions of both words illustrates the similarities between the two. Execution of a statute is “[t]he act of carrying out or putting [the law] into effect.” BLACK’S LAW DICTIONARY 650 (9th ed. 2009). Meanwhile, to enforce a law is “[t]o give force or effect to [the law]; to compel obedience.” *Id.* at 608.

<sup>20</sup> Much scholarly work has been dedicated to the duty to enforce laws and the instances in which the President may refuse to enforce a law. *See, e.g.*, Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989–1990); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7; Michael B. Rappaport, *The Unconstitutionality of “Signing and Not-Enforcing,”* 16 WM. & MARY BILL RTS. J. 113 (2007). However, this topic exceeds the scope of this Comment, and this Comment’s limited focus remains solely on the constitutional defense of statutes.

<sup>21</sup> Parker Rider-Longmaid, Comment, *Take Care That the Laws Be Faithfully Litigated*, 161 U. PA. L. REV. 291, 304 (2012) (“The decision not to defend a statute is distinct from the decision not to enforce it . . . Because nonenforcement and nondefense are distinct and do not necessarily operate in tandem . . . [the President] must understand these differences.” (footnotes omitted)); *see also* Marcott, *supra* note 5, at 1312 (suggesting that the duty to defend statutes has been voluntarily accepted by the Department of Justice throughout the history of the Office of the Solicitor General).

Defending a law has nothing to do with fulfilling the law's purpose; rather, to defend is "[t]o contest and endeavor to defeat a claim or demand made against [the law] in a court of justice."<sup>22</sup> While the Executive Branch is charged with executing a statute from the time it becomes law, the same cannot be said of the need for defending a statute. For example, instances arise where the Executive Branch serves as the party challenging a particular statute.<sup>23</sup> But even where that is not the case, the Constitution requires a case or controversy to first arise regarding the enforcement of a statute for its constitutionality to be challenged.<sup>24</sup> Only after a case or controversy arises can a court hear the case, and it is then that the Executive Branch, through the Department of Justice (DOJ), may undertake the statute's defense.<sup>25</sup> Consequently, many existing laws have been enforced but never required a defense because their constitutionality has never been questioned.

The most frequent scenario in which the Executive Branch defends a statute's constitutionality occurs in cases where the Executive Branch is involved from the outset because of its enforcement policies.<sup>26</sup> For example, when an individual challenges the way in which an executed law or administrative agency action impacts his individual rights, a claim regarding the law's constitutionality is often included. Because the Executive Branch is already involved through its enforcement, the DOJ also typically takes on any constitutional objection made by the opposing party and defends the Executive Branch's decision to enforce the statute in the manner questioned.

The second and more attenuated scenario of Executive Branch statutory defense involves a constitutional question that arises in litigation in which the federal government was not involved, such as a state criminal case<sup>27</sup> or private

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<sup>22</sup> BLACK'S LAW DICTIONARY 343 (2d ed. 1910).

<sup>23</sup> See, e.g., Waxman, *supra* note 9, at 1084 n.53.

<sup>24</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>25</sup> See, e.g., Waxman, *supra* note 9, at 1084 n.53 (explaining that the Solicitor General only challenged the constitutionality of a provision that was passed to invalidate a previous Executive Branch decision).

<sup>26</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (illustrating a case where the actions of a federal agency were challenged in litigation); *Castillo v. United States*, 530 U.S. 120 (2000) (illustrating a federal criminal case in which the Executive Branch prosecuted under federal law).

<sup>27</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (arising from a challenge to a Texas statute restricting abortion access); *Miranda v. Arizona*, 384 U.S. 436 (1966) (arising from prosecution under an Arizona kidnapping statute); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (arising from a challenge to a Connecticut statute forbidding the use of contraception); *Mapp v. Ohio*, 367 U.S. 643 (1961) (arising from prosecution under an Ohio law that prohibited the possession of obscene material).

law case.<sup>28</sup> Because the resolution of a constitutional issue is in the interests of the United States, a DOJ representative may be sent at any time to a “State or district in the United States to attend to the interests of the United States.”<sup>29</sup> Even if the case rises to the Supreme Court and the United States government has yet to intervene or is not party to the case, the Solicitor General may represent the interests of the United States<sup>30</sup> by filing a motion for divided argument.<sup>31</sup>

The United States distinguishes itself from other countries in that the Executive Branch typically defends a statute’s constitutionality in either scenario described above. Compared to the distinction that exists in America between the enforcement and defense of statutes, some European countries have eliminated the need to defend statutes.<sup>32</sup>

In France, the *Conseil Constitutionnel* (the Council) exists for the sole purpose of determining the constitutionality of a bill passed by the legislative branch.<sup>33</sup> Instead of waiting for a case or controversy to arise like in the United States, the Council’s review occurs directly after the bill is passed but before it is published as law.<sup>34</sup> Within one month of receiving the bill, and after at least sixty members of Parliament agree to have it reviewed, the Council must decide the bill’s constitutionality and accept or repeal it, in part or in full, based on that consideration.<sup>35</sup> Thus, unlike in the United States, this type of preliminary review of the law’s constitutionality eliminates future scenarios in which the French government would need to involve itself in the defense of a law.

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<sup>28</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (involving state law prohibiting contracts that disallowed workers from initiating class action lawsuits); *Kelo v. City of New London*, 545 U.S. 469 (2005) (arising from a city’s use of eminent domain to acquire land for economic development); *Lochner v. New York*, 198 U.S. 45 (1905) (involving the prosecution of a business owner for violating state law regarding work contracts).

<sup>29</sup> 28 U.S.C. § 517 (2006) (permitting DOJ officials to intervene as a party to the case, or, more commonly, to put forward a statement of interest or brief representing its position in the matter at issue).

<sup>30</sup> See generally *Days*, *supra* note 12, at 487–88 (describing the Solicitor General requesting time to argue on behalf of the government).

<sup>31</sup> This permits the Solicitor General to request time at oral arguments at the Supreme Court to express the interests of the United States in the case. See SUP. CT. R. 28.

<sup>32</sup> See generally John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004) (describing how the Solicitor General argues on behalf of the government).

<sup>33</sup> *Id.* at 1691.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



In Italy, a judge who must apply a statute in a particular case has the option to refer the law to the Italian Constitutional Court if the judge “has the slightest doubt concerning the ‘constitutionality’ of a statute . . . [or] when she feels that the strict enforcement of the statute law may possibly result in injustice.”<sup>36</sup> The Constitutional Court then accepts or rejects the question and sometimes offers an interpretation of the law that comports with the constitution.<sup>37</sup> This mechanism, though it empowers Italy’s judiciary considerably, allows for an alternative approach that prevents Italy’s government from having to defend its statutes in court. In this Comment’s subsequent discussion regarding alternative methods by which to defend statutes,<sup>38</sup> practices such as these prove rather instructive.

While examining the enforcement and defense of statutes in actual practice helps illustrate the differences between the two actions, a history of how the Executive Branch undertook the responsibility of defending statutes further distinguishes them.

*B. Executive Branch Statutory Defense Is a Tradition and Not a Constitutionally Mandated Duty*

As discussed in the previous section, some mistakenly believe that defending a statute is inherent in the idea of enforcing it, and they associate the responsibility of statutory defense with the President’s constitutionally mandated duties.<sup>39</sup> Yet examining the history related to the Executive Branch’s defense of statutes illustrates the vital differences that exist between the two.

The development of statutory defense over time emphasizes the distinction between the enforcement and defense of statutes. History shows that “defending the constitutionality of congressional statutes in court [arose] as a practical arrangement, rather than a constitutionally mandated agreement.”<sup>40</sup> Though the Office of the Attorney General was created as part of the original Cabinet<sup>41</sup> to “prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned,”<sup>42</sup> Congress relied initially on independent

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<sup>36</sup> *Id.* at 1688 (emphasis omitted) (footnote omitted).

<sup>37</sup> *Id.*

<sup>38</sup> See *infra* Part IV.

<sup>39</sup> See, e.g., *Executive Discretion*, *supra* note 5 (arguing the responsibility to defend is inferred from the President’s duty to faithfully execute the laws).

<sup>40</sup> Marcott, *supra* note 5, at 1312.

<sup>41</sup> *Id.* at 1310.

<sup>42</sup> Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

solicitors to assist in its internal legal affairs.<sup>43</sup> This ended, however, when the influx of litigation stemming from the Civil War became too expensive and placed an unmanageable burden on the federal government.<sup>44</sup> Recognizing the futility of such scattered representation, Congress passed a law to centralize the legal matters of the government.<sup>45</sup> The Act created the DOJ<sup>46</sup> and established the Attorney General position to lead the Department's efforts.<sup>47</sup>

Along with creating the DOJ and the position of Attorney General, Congress sought to alleviate its cost-prohibitive practice of hiring private solicitors through the creation of a Solicitor General position.<sup>48</sup> Congress intended the Solicitor General to be “an officer learned in the law, [who would] assist the Attorney-General in the performance of his duties”<sup>49</sup> and help “[d]etermin[e] whether, and to what extent, appeals will be taken by the Government to all appellate courts.”<sup>50</sup> Given this context, it appears as if “[t]he Solicitor General’s policy of defending congressional statutes may have originated as a result of the fact that, historically, Congress lacked the formal authority to litigate on its own behalf and thus generally relied upon the Justice Department to do so.”<sup>51</sup>

Accounts of modern Solicitors General still support the general proposition that the defense of statutes is an Executive Branch *tradition*, not a duty. Statements by Solicitors General of both political parties reinforce the idea that defending statutes is separate and detached from the President’s Article II enforcement powers. Seth Waxman, who served as Solicitor General under President Clinton, stated that “[t]o the Congress, Solicitors General have long *assumed* the responsibility, except in rare instances, of defending the constitutionality of enactments.”<sup>52</sup> Additionally, Theodore Olson, former Solicitor General under President George W. Bush, suggested that the Solicitor

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<sup>43</sup> See Marcott, *supra* note 5, at 1310.

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

<sup>45</sup> Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, 162; Marcott, *supra* note 5, at 1310–11.

<sup>46</sup> Marcott, *supra* note 5, at 1310–11.

<sup>47</sup> *Id.* at 1311.

<sup>48</sup> See Act of June 22, 1870 § 2 (establishing the Office of the Solicitor General); Marcott, *supra* note 5, at 1310–11 (explaining that Congress created the Office of the Solicitor General in the wake of an increase in government litigation following the Civil War, which resulted in a financial burden from hiring private attorneys).

<sup>49</sup> Act of June 22, 1870 § 2.

<sup>50</sup> 28 C.F.R. § 0.20(b) (2012).

<sup>51</sup> Days, *supra* note 12, at 501.

<sup>52</sup> Seth P. Waxman, “Presenting the Case of the United States as It Should Be”: *The Solicitor General in Historical Context*, J. SUPREME CT. HIST., Dec. 1998, at 3, 3 (emphasis added).

General has “*long been responsible* for defending the constitutionality of congressional statutes.”<sup>53</sup> The omission from these statements of any connection between this assumed responsibility and a constitutional mandate illustrates the fact that such a defense is not constitutionally—or even statutorily—required.

Beyond the inference drawn from the above statements, other Solicitors General have acknowledged explicitly that they are not bound by any constitutional requirement to defend a statute. Drew Days, who served as the Solicitor General prior to Seth Waxman under President Clinton, noted that “the Solicitor General has *the power to decide* whether to defend the constitutionality of the acts of Congress *or even affirmatively challenge such laws*.”<sup>54</sup> Even more forceful in the matter was Robert Bork, who served as Solicitor General under Presidents Nixon and Ford.<sup>55</sup> Bork stated, “[I]t would seem to me not only institutionally unnecessary but a betrayal of profound obligations to the Court and to constitutional processes to take the simplistic position that whatever Congress enacts [the Solicitor General] will defend, entirely as [an] advocate[] for the [United States].”<sup>56</sup> One notable Solicitor General incorporated these sentiments into action when he, while serving as Solicitor General, refused to defend an FCC affirmative action program. There, “[t]he commission filed its own brief defending the program, and the court upheld it. The acting [S]olicitor [G]eneral who refused to defend the program, John G. Roberts Jr., is now [C]hief [J]ustice of the United States.”<sup>57</sup> Waxman and Bork’s statements, and the actions of Chief Justice Roberts, show that the Executive Branch reserves the right *not* to carry out its traditional function of defending congressional legislation. Such would certainly not be the case, however, if defending statutes was constitutionally mandatory.

Because the defending of statutes was initiated voluntarily and is still performed out of tradition, doing so remains distinct from the constitutionally mandated duty to enforce statutes. Thus, when confronted with a decision

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<sup>53</sup> Theodore B. Olson, U.S. Solicitor Gen., *The Advocate as Friend: The Solicitor General’s Stewardship Through the Example of Rex E. Lee*, Keynote Address at the Rex E. Lee Conference on the Office of the Solicitor General (Sept. 12, 2002), in 2003 BYU L. REV. 3, 7 (emphasis added).

<sup>54</sup> Days, *supra* note 12, at 499 (emphasis added).

<sup>55</sup> See Editorial, *The Great Robert Bork*, WALL ST. J., Dec. 20, 2012, at A18; Theodore B. Olson, *Remembering a Great American*, WASH. TIMES, Dec. 21, 2012, at B3.

<sup>56</sup> *Representation of Congress and Congressional Interests in Court: Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 94th Cong. 501 (1975) [hereinafter *Representation of Congress Hearing*].

<sup>57</sup> Adam Liptak, *The President’s Courthouse*, N.Y. TIMES, Feb. 27, 2011, at WK5.

whether to defend the constitutionality of a statute, the President is not forced to offer a defense. Instead, he has four options from which to choose. The President may: (1) enforce and defend the statute; (2) enforce but not defend the statute;<sup>58</sup> (3) not enforce the statute but defend it;<sup>59</sup> or (4) not enforce or defend the statute.<sup>60</sup> While the distinction between enforcing and defending becomes most prevalent in the second and third examples, this Comment analyzes only instances in which laws are enforced but not defended.

### C. *Exceptions to the Executive Branch Tradition of Statutory Defense*

Since the Executive Branch is not required to defend statutes, instances occur where it refrains from offering a defense. Though there are no formal guidelines for Executive Branch officials to consult in making decisions to not defend statutes,<sup>61</sup> two recognized exceptions exist that justify nondefense.<sup>62</sup> First, the Executive is not expected to defend a statute if the law encroaches on inherent powers of the Executive Branch.<sup>63</sup> The second exception arises when “defending the statute would require the Solicitor General to ask the Supreme Court to overrule one of its constitutional precedents.”<sup>64</sup>

#### 1. *Laws That Infringe on Executive Branch Power*

The first exception exists to protect the President from having to defend a law that potentially diminishes the powers of the Executive Branch.<sup>65</sup> Without such an exception, the President would be deprived of the ability to challenge the law, thus making the Executive Branch susceptible to losses of power with

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<sup>58</sup> See Attorney General’s Letter, *supra* note 1.

<sup>59</sup> While the notion of not enforcing but defending a statute may seem peculiar, many such examples arise upon a new presidential administration taking office and changing the policy of how a particular law is enforced. For example, President Obama in 2009 instructed the DOJ to not prosecute individuals who use or prescribe medical marijuana in states that have legalized such use. See John Nichols, *The Nation: DOJ Backs Off Medical Marijuana*, NPR (Oct. 20, 2009, 7:40 AM), <http://www.npr.org/templates/story/story.php?storyId=113959834>. This, of course, remains constantly subject to change. See John Hoeffel, *Obama Shifts to a Hard Line on Pot Sales*, L.A. TIMES, Oct. 8, 2011, at A1.

<sup>60</sup> See *infra* notes 67–70 and accompanying text. Wilson refused to enforce the Postmaster’s mandatory four-year term or removal with advice and consent of the senate, and the Solicitor General refused to defend the statute. *Id.*

<sup>61</sup> Letter from Andrew Fois, Assistant Att’y Gen., U.S. Dep’t of Justice, to Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (Mar. 22, 1996), available at <http://www.volokh.com/wp-content/uploads/2011/02/DOJ1996.pdf>.

<sup>62</sup> Waxman, *supra* note 9, at 1083.

<sup>63</sup> See *Executive Discretion*, *supra* note 5, at 973.

<sup>64</sup> Waxman, *supra* note 9, at 1085.

<sup>65</sup> See *id.* at 1084.

each similar law that Congress passes.<sup>66</sup> Two well-known cases illustrate examples of when this first exception has been employed in the past.

The first case, *Myers v. United States*,<sup>67</sup> involved the President's nondefense of a statute implicating his removal power. The law at issue in *Myers* stated that "Postmasters . . . shall be appointed and may be removed by the President by and with the advice and consent of the Senate."<sup>68</sup> When President Wilson removed Myers from his postmaster position without consent from the Senate, Myers objected and later sued for back pay on the basis that his dismissal violated the law.<sup>69</sup>

Though Myers had challenged how President Wilson executed the statute, the Solicitor General refused to defend the law because he believed the limitations the law imposed on the President's removal power were unconstitutional.<sup>70</sup> The Court agreed and struck down the law.<sup>71</sup> The uniqueness of the Solicitor General's position—that the law was unconstitutional—was noted in oral arguments by Myers's counsel: "In the 136 years that have passed since the Constitution was adopted, there has come before this Court for the first time . . . a case in which the Government, through the Department of Justice, questions the constitutionality of its own act."<sup>72</sup> Yet in a gesture of approval, the Court closed its opinion by expressing its gratitude to, and implicit approval of, Senator George Pepper, the Legislative Branch member who argued for the law as *amicus curiae*.<sup>73</sup>

Arguably the most well-known example of a President not defending a law that encroached on executive powers occurred in *INS v. Chadha*.<sup>74</sup> In *Chadha*, the Court addressed the constitutionality of a one-House veto provision that enabled either House in Congress to invalidate a decision of the Attorney

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<sup>66</sup> *Executive Discretion*, *supra* note 5, at 973–74. Even if a President objects to the law through the use of a veto, the President is rendered helpless without this exception if Congress possesses enough votes to override the veto. U.S. CONST. art. I, § 7, cl. 3. Moreover, a future President might object to a law enacted during a previous Administration, in which case he would have no recourse aside from not enforcing or defending the law. See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994).

<sup>67</sup> 272 U.S. 52 (1926).

<sup>68</sup> *Id.* at 107 (internal quotation marks omitted).

<sup>69</sup> *Id.* at 178 (McReynolds, J., dissenting).

<sup>70</sup> See *id.* at 108 (majority opinion).

<sup>71</sup> *Id.* at 176.

<sup>72</sup> *Id.* at 57 (reproducing a condensed version of the oral arguments).

<sup>73</sup> *Id.* at 176.

<sup>74</sup> 462 U.S. 919 (1983).

General.<sup>75</sup> Under the Immigration and Nationality Act,<sup>76</sup> Congress vested the United States Attorney General with the discretion to suspend deportation and grant permanent residency to aliens.<sup>77</sup> Chadha, an East Indian alien, had been admitted to the United States on a student visa, but remained in the country after his visa had expired.<sup>78</sup> Pursuant to the Immigration and Nationality Act, Chadha applied for suspension of the deportation to an immigration judge, and the judge ordered the suspension of Chadha's deportation.<sup>79</sup> Based on this holding, the Attorney General recommended to Congress that Chadha's deportation be suspended.<sup>80</sup> Despite this, the House invoked its one-House veto power—as prescribed by the Immigration and Nationality Act—and rejected the Attorney General's recommendation.<sup>81</sup> Chadha filed suit, claiming that the House resolution was unconstitutional as a violation of separation of powers.<sup>82</sup>

The Court in *Chadha* decided on a “categorical invalidation of the legislative veto”<sup>83</sup> after declaring that Congress did not have the ability to overrule executive action without a resolution in both the House and Senate.<sup>84</sup> The Court invoked strong notions of formalism, emphasizing that each branch of government must confine itself to its assigned responsibility.<sup>85</sup> Though admitting that these responsibilities are “not ‘hermetically’ sealed” from each other, the Court granted very little leeway in favor of this understanding.<sup>86</sup> The Court found that the legislative veto “was not within any of the express constitutional exceptions authorizing one House to act alone,” and that it was clearly “an exercise of legislative power” that required Article I authority.<sup>87</sup>

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<sup>75</sup> *Id.* at 923.

<sup>76</sup> Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

<sup>77</sup> *Id.* § 244(a) (repealed 1996).

<sup>78</sup> *Chadha*, 462 U.S. at 923.

<sup>79</sup> *Id.* at 923–24 (ordering the deportation suspended upon finding that Chadha “had resided continuously in the United States for over seven years, was of good moral character, and would suffer ‘extreme hardship’ if deported”).

<sup>80</sup> *Id.* at 925.

<sup>81</sup> *Id.* at 927.

<sup>82</sup> *Id.* at 928.

<sup>83</sup> Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 599 (1990).

<sup>84</sup> *Id.*; accord *Chadha*, 462 U.S. at 956–57.

<sup>85</sup> *Chadha*, 462 U.S. at 951.

<sup>86</sup> See *id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam)).

<sup>87</sup> *Id.* at 956–57.

## 2. Requesting to Overturn Supreme Court Precedent

The second exception to the practice of the Executive Branch defending federal statutes arises when “defending the statute would require the Solicitor General to ask the Supreme Court to overrule one of its constitutional precedents.”<sup>88</sup> Thus, the cases arising under this exception usually “involve statutes whose constitutionality has been undermined by Supreme Court decisions rendered *after* the law’s enactment.”<sup>89</sup> Alternatively, the exception arises when the Solicitor General makes a determination as to whether Supreme Court precedent should be overruled. Perhaps the most notable example of this came when the Solicitor General asked the Supreme Court to overrule the separate-but-equal doctrine set forth in *Plessy v. Ferguson*.<sup>90</sup>

As can be seen in a more recent example, the Solicitor General remains cautious in arguing this exception. In *Dickerson v. United States*, the Supreme Court evaluated a law that Congress passed soon after the Court’s famous *Miranda v. Arizona*<sup>91</sup> decision.<sup>92</sup> Rather than defend the statute and argue that the Court overturn *Miranda* and “the dozens of cases that have followed, applied, and extended [*Miranda*],”<sup>93</sup> the Solicitor General refused to defend it because of “the Supreme Court’s repeated, consistent application of *Miranda* to the States.”<sup>94</sup> In a 7–2 decision, the Court agreed with the Solicitor General and declined to overrule *Miranda*.<sup>95</sup>

While the above exceptions to the defense of statutes are not codified or required, Solicitors General have tended to agree on the prudence of each.<sup>96</sup> More specifically, the exceptions have been justified by “the Solicitor General’s duty to account for the interests of all three branches of government.”<sup>97</sup> Yet as the next Part describes, the relatively recent rise of departmentalism has led each branch to more actively account for its own

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<sup>88</sup> Waxman, *supra* note 9, at 1085.

<sup>89</sup> *Id.* at 1086.

<sup>90</sup> 163 U.S. 537 (1896); see Waxman, *supra* note 9, at 1087 & n.72.

<sup>91</sup> 384 U.S. 436 (1966).

<sup>92</sup> 530 U.S. 428, 431–32 (2000). The law at issue made statements given to law enforcement officers admissible so long as the statements were voluntary and regardless of whether the defendant had been issued his *Miranda* rights. See 18 U.S.C. § 3501 (2006).

<sup>93</sup> Waxman, *supra* note 9, at 1088.

<sup>94</sup> *Id.* at 1087.

<sup>95</sup> *Dickerson*, 530 U.S. at 444.

<sup>96</sup> See, e.g., Waxman, *supra* note 9, at 1084–86; *Executive Discretion*, *supra* note 5, at 973–74.

<sup>97</sup> Waxman, *supra* note 9, at 1084.

interests, thus causing the Executive Branch to stretch the boundaries of the exceptions for the nondefense of statutes.

## II. THE SHIFT OF STATUTORY DEFENSE TOWARD DEPARTMENTALISM

Recognizing that approaches to constitutional interpretation change over time, this Part addresses a major change that has occurred relatively recently. The importance of the change is especially relevant because of its impact on how statutes have been interpreted and defended. This Part first discusses the shift from notions of judicial review to departmentalism, then examines the impact of that shift on statutory defense, and concludes with how President Obama has contributed to departmentalism's impact on the defense of statutes.

### A. *Erosion of Judicial Review and Judicial Supremacy*

By the mid-twentieth century, the Court had transformed Chief Justice Marshall's notion of judicial review—that it was “the province and duty of the judicial department to [s]ay what the law is”<sup>98</sup>—into an idea more closely resembling judicial supremacy. In *Cooper v. Aaron*, the Court interpreted *Marbury v. Madison* as “declar[ing] the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and [this] principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”<sup>99</sup> Thus, whereas Chief Justice Marshall's notion of judicial review permitted the Court to strike down an act of a coordinate branch, the Court's later interpretations attempted to empower the Court with a sense of judicial supremacy that created “the obligation of coordinate officials not only to obey that ruling but to follow its reasoning in future deliberations.”<sup>100</sup>

However, fifteen years before the Court's declaration in *Cooper*, the origins of what would eventually become the theory of departmentalism began emerging subtly. In 1943, Congress passed the Urgent Deficiency Appropriation Act.<sup>101</sup> Though the law provided war funding for the military's efforts in World War II, a provision in the law called for the withholding of

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<sup>98</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>99</sup> 358 U.S. 1, 18 (1958).

<sup>100</sup> Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 368 (1997) (quoting Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 407 (1986)) (internal quotation marks omitted).

<sup>101</sup> Ch. 218, 57 Stat. 431 (1943).



salaries for certain federal employees.<sup>102</sup> Though President Roosevelt signed and enforced the law to prevent a delay in war appropriations, he announced his belief that the law's provision withholding employee salaries was unconstitutional.<sup>103</sup> When the federal employees who had been refused wages challenged the law in *United States v. Lovett*, President Roosevelt relied upon his own constitutional interpretation and refused to defend the statute.<sup>104</sup> In place of an executive officer, Congress appeared as *amicus curiae* to defend the law to the Supreme Court.<sup>105</sup>

The Court agreed with President Roosevelt and held the law in *Lovett* to be unconstitutional. More importantly, the Court remained silent as to whether President Roosevelt acted improperly in refusing to defend the statute.<sup>106</sup> The implicit presumption, therefore, was that the President could make and act upon a determination of a statute's constitutionality outside the confines of the previously discussed exceptions for statutory nondefense. Though it would take decades for others to act on this presumption, President Roosevelt's decision not to defend the law in *Lovett* foreshadowed the transformation that would occur in constitutional interpretive theory throughout the latter half of the twentieth century.<sup>107</sup> The heavy reliance on the Judicial Branch as the authoritative voice regarding the constitution would erode, thus allowing each branch to play a more active role in constitutional interpretation.<sup>108</sup>

The Reagan Administration served as the clear leader in the movement toward equalizing the ability of each branch to render constitutional interpretations. Beginning in the 1980s, President Reagan's DOJ expanded President Roosevelt's example of executive nondefense of statutes beyond the

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<sup>102</sup> *Id.* § 304.

<sup>103</sup> See *United States v. Lovett*, 328 U.S. 303, 313 (1946) ("The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional." (internal quotation marks omitted)).

<sup>104</sup> *Id.* at 306, 313 (noting that the President opined when signing the bill that the law was unconstitutional, and the Solicitor General, appearing for the government, joined the position that the law was unconstitutional).

<sup>105</sup> *Id.* at 304 (identifying John C. Gall as *amicus curiae* by special leave of the Court arguing for Congress in favor of reversal).

<sup>106</sup> See *Lovett*, 328 U.S. 303 (abstaining from comment regarding President Roosevelt's interpretation).

<sup>107</sup> James L. Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 *IND. L.J.* 675, 675–77 (1990) (describing the increase in Executive Branch participation in the development of law during the Reagan Administration in the 1980s).

<sup>108</sup> See Edwin Meese III, *The Law of the Constitution*, 61 *TUL. L. REV.* 979 (1987) (describing the view that all of the coordinate branches of government have a duty to interpret the Constitution).

traditionally recognized exceptions.<sup>109</sup> Beginning with the premise that “in many instances the Constitution should be reinterpreted to prohibit the federal government from acting,”<sup>110</sup> President Reagan’s DOJ released a series of reports<sup>111</sup> that “express[ed] [a striking] independence from then-prevailing Supreme Court doctrine . . . [and] constituted blueprints for what the Reagan [A]dministration believed the law should look like.”<sup>112</sup> In addition, the Reagan Administration filed several amicus briefs to the Court that interjected its own constitutional interpretation into the arguments it made to the Court.<sup>113</sup>

The Reagan Administration’s actions against judicial supremacy were arguably encompassed within a speech by then-Attorney General Edwin Meese. Meese explicitly spoke against the idea of judicial supremacy by asserting that a constitutional holding by the Court “does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore.”<sup>114</sup> Instead, Meese promoted the notion that constitutional interpretation was a function that had been entrusted equally to each branch of the government and *not* exclusively to the Judiciary.<sup>115</sup> Though Meese’s claim would not come to fruition for a few more years, his efforts furthered the idea of what many now refer to as departmentalism.

A few years after Meese’s speech, the theory of departmentalism came to the forefront, premised on the assertion that the coordinate branches possess coequal interpretive authority that remains unbound by the legal views of the other branches.<sup>116</sup> Arguing that “[t]he power to interpret federal law is not a specifically-enumerated power of any particular branch,”<sup>117</sup> proponents of departmentalism asserted that previous understandings of *Marbury* were wrong, and that judicial review is nothing more than “a special instance of the implied judicial power to interpret.”<sup>118</sup>

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<sup>109</sup> See Cooper, *supra* note 107, at 675–77.

<sup>110</sup> Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 385 (2003).

<sup>111</sup> *Id.* at 385–86.

<sup>112</sup> *Id.* at 386.

<sup>113</sup> Cooper, *supra* note 107, at 688.

<sup>114</sup> Meese, *supra* note 108, at 983.

<sup>115</sup> *Id.* at 985–86.

<sup>116</sup> See generally Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (discussing the Executive Branch’s power to interpret the law).

<sup>117</sup> *Id.* at 241; accord Akhil Reed Amar, *Architecture*, 77 IND. L.J. 671, 692 (2002).

<sup>118</sup> Paulsen, *supra* note 116, at 241.

In that spirit, departmentalism “recognizes the authority of each federal branch or ‘department’ to interpret the Constitution independently.”<sup>119</sup> While general agreement exists regarding the notion that each branch must interpret the Constitution to a certain extent in performance of its constitutional duties, debate centers on the scope of each branch’s interpretation.<sup>120</sup> Proponents of a stronger form of departmentalism argue that lesser deference in the interpretive independence of each branch will result in better constitutional outcomes.<sup>121</sup> Others attempt to find commonality between the notions of departmentalism and judicial supremacy.<sup>122</sup> While the scope of departmentalism remains unclear, its effect on the defense of statutes has become more apparent.

### *B. Departmentalism’s Impact on the Defense of Statutes*

Recent years have seen a rise in Executive Branch nondefense of statutes<sup>123</sup> and an increase in the instances in which the Supreme Court has struck down laws as unconstitutional.<sup>124</sup> One possible explanation is the presence of an emboldened Executive Branch that is more willing to inject political ideology into a tradition often thought of as politically neutral. However, the increased frequency of nondefense most likely reflects a growing acceptance of the coequal constitutional interpretation called for by departmentalism.

One of the more familiar and relatively recent examples of executive nondefense of statutes provides evidence that departmentalism—not politics—is causing the upward trend in statutory nondefense. In 1996, Congress passed the National Defense Authorization Act for Fiscal Year 1996.<sup>125</sup> The Act provided military funding, but it also included an amendment that called for military discharges of all service members who had HIV.<sup>126</sup> Though President Clinton vetoed the law after its first passage,<sup>127</sup> Congress passed the Act again

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<sup>119</sup> Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., Summer 2004, at 105, 106.

<sup>120</sup> See *id.* at 109 (arguing for a new theory of functional departmentalism that, as opposed to departmentalism, does not give plenary coequal power to the coordinate branches).

<sup>121</sup> See Paulsen, *supra* note 116, at 330.

<sup>122</sup> See Johnsen, *supra* note 119, at 109 (arguing for each branch to possess limited authority to act on independent constitutional interpretations).

<sup>123</sup> See Mauro, *supra* note 14.

<sup>124</sup> Waxman, *supra* note 9, at 1074 (noting that the Supreme Court struck down only 127 laws during the first 200 years following ratification of the Constitution, but has struck down twenty-six since 1995).

<sup>125</sup> Pub. L. No. 104-106, 110 Stat. 186 (repealed 1996).

<sup>126</sup> *Id.* § 567, 110 Stat. at 328.

<sup>127</sup> See Gussis, *supra* note 10, at 596 (citing the HIV provision among the reasons for which President Clinton vetoed the law upon its initial passage).

with a bipartisan majority.<sup>128</sup> Upon signing the law,<sup>129</sup> President Clinton announced that the provision regarding HIV-positive service members would not be defended by his Administration.<sup>130</sup> Though that provision of the law did not invoke either of the established exceptions that justify statutory nondefense,<sup>131</sup> President Clinton followed the actions of President Roosevelt in *Lovett* and instructed his DOJ not to defend the law in court because of his belief that the provision was unconstitutional.<sup>132</sup>

Tensions existed regarding the scope of departmentalism within the debate surrounding President Clinton's decision to not defend the law. Ardent supporters of judicial supremacy advocated for a heightened standard to prevent President Clinton's DOJ from refusing to defend the law.<sup>133</sup> Such a standard would have required "the Attorney General [to believe], not only personally as a matter of conscience, but also in his official capacity as the Chief Legal Officer of the United States, that a law is so patently unconstitutional that it cannot be defended."<sup>134</sup> In other words, this standard would have required the President to defend the law if reasonable arguments

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<sup>128</sup> Though Republicans held the majority in both houses, the vote in favor of the Act did not fall along partisan lines. In the House, the Act passed with 62% of the vote, including a third of all Democrats voting. *See House Vote #865 in 1995*, GOVTRACK.US, <http://www.govtrack.us/congress/vote.xpd?vote=h1995-865> (last visited May 12, 2013). In the Senate, it passed with fifty-six votes and would not have passed without the votes of fourteen Democrat Senators voting across the aisle. *See U.S. Senate Roll Call Votes 104th Congress—2d Session*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=104&session=2&vote=00005](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00005) (last visited May 11, 2013).

<sup>129</sup> President Clinton signed the bill into law, but successfully repealed it before the law went into effect. Gussis, *supra* note 10, at 597–98.

<sup>130</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS 226 (Feb. 10, 1996).

<sup>131</sup> *See supra* Part I.C.

<sup>132</sup> *See* Press Briefing by Counsel to the President Jack Quinn and Assistant Attorney General Walter Dellinger (Feb. 9, 1996) [hereinafter Quinn and Dellinger Press Briefing], available at <http://clinton6.nara.gov/1996/02/1996-02-09-quinn-and-dellinger-briefing-on-hiv-provision.html>. Other examples exist of when the President has decided not to defend laws based on his belief that the law is unconstitutional. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 2000 (1995); *United States v. Lovett*, 328 U.S. 303 (1946); *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (en banc).

<sup>133</sup> *See* Gussis, *supra* note 10, at 604–23 (describing the established exception that a President can refuse to defend a statute if it is clearly unconstitutional, but arguing that, in refusing to defend the HIV provision, President Clinton used a lesser standard of declining to defend if the statute is probably unconstitutional).

<sup>134</sup> *Representation of Congress Hearing*, *supra* note 56, at 10 (statement of Assistant Att'y Gen. Rex E. Lee).

existed in its favor,<sup>135</sup> and here Supreme Court precedent suggested that there were reasonable arguments to defend the HIV provision.<sup>136</sup>

Yet the increasing trend toward departmentalism allowed President Clinton to rely upon a less strenuous standard for nondefense. Rather than promoting the reasonable arguments in favor of the law, President Clinton relied on the fact that the constitutionality of the statute had not been explicitly settled as a matter of law.<sup>137</sup> Under this rationale, President Clinton transformed the practice from the Executive Branch submitting the question to the Court for resolution, to the Executive Branch making its own constitutional interpretation.<sup>138</sup> As President Clinton's decision not to defend the HIV provision showed, the movement toward departmentalism leaves much discretion to the President and allows the Executive Branch to make decisions tending to support policy preferences and the political agenda of the President.<sup>139</sup> This standard provides the Executive Branch greater flexibility in assessing whether to defend a federal statute, and the Executive Branch has utilized this flexibility to consistently refrain from defending a statute.

### C. *President Obama's Contribution to the Growth of Departmentalism*

President Obama most recently illustrated the fluidity inherent in the President's duty to defend statutes with his decision regarding DOMA. Prior to two cases arising in federal court, *Windsor v. United States*<sup>140</sup> and *Pedersen v. Office of Personnel Management*,<sup>141</sup> the Obama Administration had set aside its political opposition to DOMA and consistently defended the law against various constitutional challenges according to judicial precedent.<sup>142</sup> This defense ended, however, upon Attorney General Eric Holder declaring that the Obama Administration's newfound interpretation of Section Three of

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<sup>135</sup> The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25, 25–26 (1981) (“In my view, the Department has the duty to defend an act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts.”).

<sup>136</sup> See Gussis, *supra* note 10, at 611–12 (describing Supreme Court precedent for judicial deference to congressional choices regarding the military).

<sup>137</sup> *Id.* at 608.

<sup>138</sup> See *id.* at 623–24.

<sup>139</sup> See *id.* at 624.

<sup>140</sup> 833 F. Supp. 2d 394 (S.D.N.Y.), *aff'd*, 699 F.3d 169 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012).

<sup>141</sup> 881 F. Supp. 2d 294, 299 (D. Conn. 2012).

<sup>142</sup> Ellerson, *supra* note 3.

DOMA<sup>143</sup> warranted a heightened level of legal scrutiny, which resulted in the conclusion that DOMA was unconstitutional.<sup>144</sup>

Despite the growth of Executive Branch nondefense, the announcement by Attorney General Holder that the Obama Administration would cease its defense of DOMA generated a flurry of reactions throughout the country.<sup>145</sup> While much of the focus remained on how the decision was a significant shift in policy regarding a highly contentious topic,<sup>146</sup> the lesser discussed issue concerned how the shift was conducted. Though nondefense was not foreign to the political landscape at the time, the Obama Administration's asserted justification fell outside the nondefense framework and pushed departmentalism to a level never previously experienced.

Pursuant to federal law,<sup>147</sup> Attorney General Holder authored a letter to the House of Representatives and informed them of DOJ's decision not to defend DOMA in the district court cases and the reason why.<sup>148</sup> The Attorney General wrote that President Obama and he had "concluded that classifications based on sexual orientation warrant heightened scrutiny,"<sup>149</sup> under which "Section 3 of [DOMA] . . . violates the equal protection component of the Fifth Amendment."<sup>150</sup> That President Obama's decision fell outside the scope of the recognized exceptions for the Executive Branch nondefense of statutes<sup>151</sup> illustrates the unique nature of President Obama's actions.

The Obama Administration illustrated a departmentalist approach in regard to DOMA by ignoring related caselaw and declaring that DOMA violated the Constitution. Though Attorney General Holder explained that "[t]he Supreme Court has yet to rule on the appropriate level of scrutiny for classifications

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<sup>143</sup> Defense of Marriage Act, 1 U.S.C. § 7 (2006) (providing that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife").

<sup>144</sup> Attorney General's Letter, *supra* note 1.

<sup>145</sup> See, e.g., Jan Crawford, *Obama Administration Decision to Not Defend Defense of Marriage Act Will Trigger Heated Political Battle*, CBS NEWS (Feb. 23, 2011, 3:13 PM), [http://www.cbsnews.com/8301-504564\\_162-20035495-504564.html](http://www.cbsnews.com/8301-504564_162-20035495-504564.html).

<sup>146</sup> See Attorney General's Letter, *supra* note 1.

<sup>147</sup> 28 U.S.C. § 530D(a)(1) (2006) (requiring that the Attorney General report to Congress "any instance in which the Attorney General or any officer of the Department of Justice" decides not to enforce, apply, or administer a federal law on the ground that the law is unconstitutional, or decides not to defend a law against constitutional attack).

<sup>148</sup> Attorney General's Letter, *supra* note 1.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See *supra* Part II.C.

based on sexual orientation,”<sup>152</sup> many believe the Court’s ruling in *Lawrence v. Texas*.<sup>153</sup> suggests otherwise.<sup>154</sup> In *Lawrence*, the Court recognized an individual’s liberty interest in taking part in homosexual sodomy and struck down an antisodomy law in Texas.<sup>155</sup> However, the decision in *Lawrence* explicitly stopped short of declaring such conduct to be a fundamental right under the Due Process Clause and thus refrained from applying strict scrutiny.<sup>156</sup> Some circuit courts have interpreted this to implicitly represent the Court’s determination regarding the appropriate level of scrutiny for classifications based on sexual orientation.<sup>157</sup> Moreover, a majority of other circuits have come to the same conclusion for different reasons.<sup>158</sup> Notwithstanding the Court’s approach in *Lawrence* and the overwhelming approach regarding the level of scrutiny applied to the sexual-orientation-based classification within the federal circuit courts of appeals, the Administration evaluated the question according to criteria set forth in *Bowen v. Gilliard*<sup>159</sup> and *City of Cleburne v. Cleburne Living Center, Inc.*<sup>160</sup> Because of this, the Administration maintained that heightened scrutiny was the proper standard of review.<sup>161</sup>

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<sup>152</sup> Attorney General’s Letter, *supra* note 1.

<sup>153</sup> 539 U.S. 558 (2003).

<sup>154</sup> See *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (holding that *Lawrence* does not mandate heightened scrutiny of an act classifying homosexuals); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006) (“[T]he Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes.”); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (“Neither the Supreme Court nor this court has recognized sexual orientation as a suspect classification . . .”); cf. *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002) (noting that discrimination based on sexual preference outside of the prison context is subject to rational basis review); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292–94 (6th Cir. 1997) (holding—even prior to *Lawrence*—that sexual orientation is not a suspect or quasi-suspect class).

<sup>155</sup> *Lawrence*, 539 U.S. at 578.

<sup>156</sup> See *id.* (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

<sup>157</sup> *Cook*, 528 F.3d at 61; *Citizens for Equal Prot.*, 455 F.3d at 866; *Johnson*, 385 F.3d at 532; cf. *Veney*, 293 F.3d 726; *Equal. Found. of Greater Cincinnati, Inc.*, 128 F.3d 289.

<sup>158</sup> *Steffan v. Perry*, 41 F.3d 677, 684 (D.C. Cir. 1994) (en banc); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

<sup>159</sup> 483 U.S. 587, 602–03 (1987) (considering the following criteria: whether the group in question has suffered a history of discrimination; whether individuals exhibit obvious, immutable characteristics that define them as a discrete group; whether the group is a minority or is politically powerless; and whether the characteristics distinguishing the group have little relation to legitimate policy objectives).

<sup>160</sup> 473 U.S. 432, 441–42 (1985) (holding that the Court should use lesser scrutiny when the group affected by a law has distinguishing characteristics that are relevant to state policy interests).

<sup>161</sup> Attorney General’s Letter, *supra* note 1.

Under heightened scrutiny, President Obama “concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional.”<sup>162</sup> Because of this conclusion, the Administration considered DOMA “the rare case where the proper course is to forgo the defense of this statute.”<sup>163</sup>

At first glance, the Obama Administration’s decision regarding DOMA appears to comport with past instances of Executive Branch nondefense. Following the trend of departmentalism, where presidents make constitutional determinations regarding statutes, President Obama seemingly made his decision based on his own constitutional interpretation regarding DOMA. However, a closer examination shows President Obama’s nondefense of DOMA took a markedly different approach than recent examples of nondefense. While recent decisions not to defend a statute have gone beyond the two recognized exceptions for nondefense, presidents still formulated their opinions regarding the constitutionality of a statute based on prior judicial decisions.<sup>164</sup> For instance, when President Clinton refused to defend a ban on HIV-positive individuals in the military, his decision relied on an established equal protection framework as defined by the Court.<sup>165</sup> Notably, the Clinton Administration refrained from arbitrarily applying a higher level of scrutiny than the Court likely would have considered had it addressed the question. Instead, the Clinton Administration applied rational basis scrutiny because of the classification at issue and<sup>166</sup> the fact that rational basis was the same standard that the Court presumably would have applied.<sup>167</sup> Even under the lower standard of rational basis scrutiny, however, the Administration asserted no legitimate government interest existed in the Act’s legislative history and reports from military leaders.<sup>168</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See Gussis, *supra* note 10, at 623–24 (describing how President Clinton’s determination that the HIV provision was unconstitutional considered both judicial precedent and policy goals).

<sup>165</sup> *City of Cleburne*, 473 U.S. at 446; see Quinn and Dellinger Press Briefing, *supra* note 132 (describing how President Clinton analyzed the HIV provision under rational basis review).

<sup>166</sup> The classification at issue would have pertained to disability, and more specifically disabled individuals testing positive for HIV. Courts have generally held that classifications based on disability should receive only rational basis review. See *City of Cleburne*, 473 U.S. at 446.

<sup>167</sup> See Quinn and Dellinger Press Briefing, *supra* note 132 (“We advised the President that this provision, which discriminates against a group of healthy and productive members of the Armed Services, would be constitutional only if it serves a legitimate governmental purpose.”).

<sup>168</sup> See Gussis, *supra* note 10, at 597–98, 620.



Comparing the Clinton and Obama Administration's examples of Executive Branch nondefense exposes the differences between the circumstances of each. From a social and political perspective, President Obama found considerably wider support for his action. In addition to growing public sentiment in favor of gay marriage and an increasing number of states that recognize such marriages,<sup>169</sup> Democrats in Congress also almost uniformly supported the President's rebuke of DOMA.<sup>170</sup> As compared to the circumstances faced by President Clinton in 1996, the year that Congress overwhelmingly passed DOMA, and the year that Democrats crossed party lines to vote for the National Defense Authorization Act (including the HIV provision), the barriers for President Obama to make this decision were far fewer in number and strength.

However, President Obama's DOMA decision was distinguishable from President Clinton's nondefense decision in that it enjoyed far less support from legal precedent. Through its rejection of the approach taken by the Court in *Lawrence* and throughout various federal circuit courts of appeals, the Obama Administration failed to take into account judicial precedent and instead implemented its own constitutional theory that differed from the applicable standard established in *Lawrence*.<sup>171</sup> While it can be argued that the *Lawrence* decision "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples,"<sup>172</sup> Justice Kennedy's majority opinion from *Lawrence* explicitly noted that "[t]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."<sup>173</sup>

Thus, the Obama Administration carved out a new niche in due process jurisprudence and, in doing so, "moved the goalposts of the usual role of the Executive [B]ranch in defending statutes. . . invest[ing] within DOJ a power to conduct an independent constitutional review of the issues . . . [and]

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<sup>169</sup> At the time this Comment was written, twelve states recognize gay marriage. See Mark Peters, *Minnesota Is Set to Allow Gay Marriage*, WALL ST. J., May 14, 2013, at A6.

<sup>170</sup> See Brief of Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Grp., Representatives Nancy Pelosi & Steny H. Hoyer—as Amici Curiae in Support of Plaintiff-Appellee and Urging Affirmance, *Golinski v. U.S. Office of Pers. Mgmt.*, Nos. 12-15388 & 12-15409 (July 10, 2012) [hereinafter *Pelosi Amicus Brief*] (arguing that Section Three of DOMA is unconstitutional).

<sup>171</sup> See *supra* note 155–63 and accompanying text.

<sup>172</sup> *Lawrence v. Texas*, 539 U.S. 558, 601 (Scalia, J., dissenting).

<sup>173</sup> *Id.* at 578 (majority opinion).

decid[ing] if there is a reasonable basis for arguing the other side.”<sup>174</sup> John Yoo, the controversial former DOJ official from the Bush Administration credited with authoring the memos allowing for enhanced interrogation, agreed with President Obama’s decision and believed “it [was] justified under the Constitution’s original allocation of authority to the President.”<sup>175</sup> Even while expressing support, however, Yoo noted that President Obama “[was] trying to change the meaning of the Bill of Rights and the Reconstruction Amendments . . . where the Supreme Court has recently exercised the institutional lead . . . in its application to individual citizens.”<sup>176</sup>

The ramifications of this approach further intensify the need for the legislative branch to play a greater role in the defense of statutes. Because the defense of statutes is becoming more contingent on the political preferences and constitutional theories of the Executive Branch, the likelihood of an effective defense becomes tenuous in circumstances where such beliefs converge with the application of a law. Rather than an objective evaluation of the statute, the Obama Administration utilized departmentalism’s focus on coequal interpretation amongst the branches to avoid defending a statute with which it disagreed. And while President Obama confronted the issue surrounding gay marriage, future presidents may face situations where they could refuse to defend laws regarding other contentious issues like health care, immigration reform, or abortion. On such issues, if Congress passed a law along a party-line vote, “the losing side just has to fashion some constitutional theories for why the legislation is unconstitutional and then wait for its side to win the Presidency. . . . [and then file] challenges to the legislation [that] will go undefended.”<sup>177</sup> Accordingly, empowering the Legislative Branch to defend its statutes would help ensure that the political and constitutional beliefs of the Executive Branch do not solely determine a particular law’s viability.

Lastly, while the President is probably more unlikely to defend a statute that was barely passed along partisan lines, the DOMA example proves such circumstances are not necessary for statutory nondefense to occur. DOMA

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<sup>174</sup> 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>.

<sup>175</sup> John Yoo, *Obama Pushes the Limits of Executive Power in DOMA Decision*, RICOCHET (Feb. 23, 2011, 11:26 PM), <http://ricochet.com/main-feed/Obama-Pushes-the-Limits-of-Executive-Power-in-DOMA-Decision>.

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

<sup>177</sup> Kerr, *supra* note 174.

passed with overwhelming majorities in both houses of Congress in 1996, was signed by a Democrat president, and endured through a Democrat and Republican presidential administration. However, DOMA still became subject to nondefense fifteen years later with the emergence of a President with differing constitutional and political views. Thus, regardless of the circumstances, the nondefense of a statute “uses the legal system to short-circuit the normal political process.”<sup>178</sup>

### III. OVERCOMING *BOWSHER*'S ANTI-AGGRANDIZEMENT PRINCIPLE

The greatest impediment to Congress possessing the primary role in defending the constitutionality of federal statutes is the anti-aggrandizement principle elaborated by the Supreme Court in *Bowsher v. Synar*.<sup>179</sup> There, the Court held “‘the Legislative Branch may not exercise executive authority.’”<sup>180</sup> While Part I explained that defending statutes is not encompassed within executive authority, this Part further shows that the anti-aggrandizement principle is not an insurmountable barrier to allowing for the congressional defense of statutes. This Part first reviews the Court’s decision in *Bowsher* and subsequent responses to it, and then it applies the *Bowsher* framework to the Legislative Branch defense of statutes to demonstrate that the practice falls within the inherent powers of Congress.

#### A. *Limitations Established by Bowsher*

The Court in *Bowsher* set the parameters surrounding Congress’s ability to delegate power to Legislative Branch officials. Thus, the scope of *Bowsher* must be understood before evaluating the constitutionality of Congress empowering itself to defend federal statutes.

In *Bowsher*, the Court considered the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985, more commonly referred to as the Gramm–Rudman–Hollings Act (the Act).<sup>181</sup> The Act represented Congress’s attempt to remedy the growing national concern regarding increasing federal budget deficits, and it sought to set a maximum annual deficit amount for federal spending.<sup>182</sup> If federal spending exceeded the

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<sup>178</sup> Yoo, *supra* note 175.

<sup>179</sup> 478 U.S. 714 (1986).

<sup>180</sup> *Id.* at 766 (White, J., dissenting) (quoting *Buckley v. Valeo*, 424 U.S. 1, 119 (1976) (per curiam)).

<sup>181</sup> *See id.* at 717 (majority opinion).

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

specified annual deficit limit for a fiscal year, the Act required across-the-board cuts to federal programs.<sup>183</sup> Though the Act's proposed spending measures raised no constitutional concerns, controversy arose regarding the mechanism through which Congress implemented the spending cuts.<sup>184</sup>

The Act's spending cuts were determined in a series of three steps. First, Directors from the Office of Management and Budget and the Congressional Budget Office created reports forecasting the budget deficit for the upcoming year and, if necessary, an estimate of budget cuts for each federal program.<sup>185</sup> Second, the Directors submitted these reports to the Comptroller General (CG), who reviewed the reports and independently recommended spending reductions for each federal program.<sup>186</sup> Finally, the CG reported his recommendations to the President, who then had to execute the reductions exactly as suggested by the CG.<sup>187</sup>

The Court in *Bowsher* held that the power Congress delegated to the CG to make binding recommendations to the President represented an attempt by Congress to aggrandize itself at the expense of the Executive Branch, and thus it was unconstitutional.<sup>188</sup> In doing so, the Court applied a two-part test to examine how the duties of the CG fit within the separation-of-powers framework.

The first step in the *Bowsher* framework was to determine whether the CG acted as an agent of the Legislative or Executive Branch.<sup>189</sup> The critical factor in the Court's analysis was that, though the President nominated the CG, the CG was removable only by an initiative of Congress and for a specific list of reasons.<sup>190</sup> The Court also considered the perceptions of Congress and former CGs in its reasoning; both members of Congress and former CGs had explicitly expressed their belief that the CG was an agent of the Legislative Branch.<sup>191</sup> Because the Court found the CG acted as an agent of the Legislative Branch and that Congress reserved the exclusive power of removal over the

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<sup>183</sup> *Id.* at 717–18.

<sup>184</sup> *See id.* at 718–19.

<sup>185</sup> *Id.* at 718.

<sup>186</sup> *Id.*

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

<sup>188</sup> *See id.* at 736 (concluding that the powers vested in the CG violated the constitutional requirement that Congress play no direct role in executing the laws).

<sup>189</sup> *See id.* at 727–28 (determining whether the CG performs his duties independently from Congress).

<sup>190</sup> *Id.* (permitting the CG to be removed for any of the following bases: permanent disability, inefficiency, neglect of duty, malfeasance, or a felony or conduct involving moral turpitude).

<sup>191</sup> *See id.* at 731.

CG, the CG was precluded from exercising executive powers in the scope of his duties.<sup>192</sup>

The second step in the *Bowsher* framework examined the functions of the CG and determined whether they were executive in nature.<sup>193</sup> The Court's focus began with the fact that the CG possessed independent, exclusive judgment regarding the budget recommendations made to the President.<sup>194</sup> Despite the argument that such responsibilities were too minor to constitute executing the law, the Court considered such power as "plainly entailing execution of the law in constitutional terms."<sup>195</sup> The thrust of the Court's attention then remained on the fact that the Act required the President to fulfill the CG's recommendations "consistent with [the Comptroller General's] report in all respects."<sup>196</sup> The Court viewed the binding nature of the CG's recommendations as evidence of Congress's attempt to entrust the Act's execution to an agent subject to its own control and removal discretion.<sup>197</sup> The Court struck down this process, holding that it amounted to Congress impermissibly attempting to "retain[] control over the execution of the Act and . . . intrude[] into the executive function."<sup>198</sup>

In dissent, Justice White quickly identified a limitation on the Court's holding that remains useful in applying the *Bowsher* decision to the Legislative Branch's defense of statutes. Justice White noted that the Court refrained from accepting the argument that only officers removable by the President may exercise executive powers.<sup>199</sup> Instead, the Court maintained its longstanding recognition that it remains "within the power of Congress under the 'Necessary and Proper' Clause to vest authority that falls within the Court's definition of executive power in officers who are not subject to removal at will by the President and are therefore not under the President's direct control."<sup>200</sup> Though the Court held the Act as unconstitutional, it was unwilling to find that only

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<sup>192</sup> See *id.* at 732.

<sup>193</sup> See *id.* at 732–33 (considering the executive nature of the CG's primary responsibility).

<sup>194</sup> See *id.*

<sup>195</sup> *Id.*

<sup>196</sup> Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 252, 99 Stat. 1038, 1074 ("The President may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages set forth in the report submitted . . ."), *invalidated by Bowsher*, 478 U.S. 714; accord *Bowsher*, 478 U.S. at 733.

<sup>197</sup> See *Bowsher*, 478 U.S. at 733–34 (finding that Congress retained control over execution of the Act by placing responsibility for its execution in the hands of an officer subject to removal only by Congress).

<sup>198</sup> *Id.* at 734.

<sup>199</sup> *Id.* at 761 (White, J., dissenting).

<sup>200</sup> *Id.* (citation omitted).

officers removable by the President may exert executive power. When examining Congress's ability to defend statutes, this element of *Bowsher* is vital.

Along with Justice White's dissent, subsequent analysis regarding *Bowsher* demonstrates inherent shortcomings in the majority decision. While the Court in *Bowsher* relied heavily on a formalist approach to the separation of powers, its analysis seemingly presumed that government functions are easily attributable to certain branches.<sup>201</sup> However, executive power is "not easily defined because the power that the executive may possess, and the way in which the executive may use this power, is as varied as Congress's ability to delegate authority."<sup>202</sup> Because the Court did not address this, it failed to reconcile the primary objection to formalism that, in regard to powers of each governmental branch, "the Constitution do[es] not establish and divide fields of black and white."<sup>203</sup> Indeed, stating that the CG performed executive functions—without first defining executive functions—was inadequate as a constitutional standard.<sup>204</sup>

Given the point made in Justice White's dissent from *Bowsher* and the fact that the Court failed to provide guidance as to what constitutes an executive versus a legislative power, the next section argues that the defense of statutes is encompassed within the inherent rights of Congress.

### B. *Applying Bowsher to the Legislative Defense of Statutes*

While Part IV puts forth a comprehensive plan for implementing the Legislative Branch's defense of statutes,<sup>205</sup> this section applies the *Bowsher* framework to the idea's basic tenets to illustrate that the Legislative Branch's defense of statutes does not violate the anti-aggrandizement principle. In applying the *Bowsher* framework, the first step does not require detailed analysis. Like in *Bowsher*, a Legislative Branch official, nominated and removable by Congress, would perform the congressional defense of statutes. Therefore, the remaining analysis in this section focuses on the second step of

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<sup>201</sup> Russell K. Osgood, *Governmental Functions and Constitutional Doctrine: The Historical Constitution*, 72 CORNELL L. REV. 553, 564 (1987).

<sup>202</sup> Kevin T. Abikoff, Note, *The Role of the Comptroller General in Light of Bowsher v. Synar*, 87 COLUM. L. REV. 1539, 1542 (1987).

<sup>203</sup> *Springer v. Gov't of the Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

<sup>204</sup> See Abikoff, *supra* note 202, at 1543.

<sup>205</sup> See *infra* Part IV.B.

the *Bowsher* framework and whether the defense of statutes should be deemed a legislative power.

Though the ability to defend statutes is not included in Congress's enumerated powers, courts have been accepting of Congress delegating authority to legislative officials when doing so "effectuate[s] one of Congress's *inherent powers* under the Constitution."<sup>206</sup> Congress's enumerated powers come with inherent authority, which include nonexplicit constitutional powers necessary for Congress to perform its explicit constitutional duties and responsibilities.<sup>207</sup> For example, in *McGrain v. Daugherty*, the Supreme Court considered the power to investigate as inherent in Congress's Article I powers.<sup>208</sup> Although Congress could legislate without investigating, the Court noted that investigating allowed Congress to gather information to assist in legislating more wisely and effectively.<sup>209</sup>

A similar argument can be made for providing Congress with the power to defend a statute against constitutional attack. Though Congress can pass a statute without possessing the power to defend it, the lack of such power potentially undercuts the effectiveness of its lawmaking abilities. Defending its statutes would allow Congress to represent its institutional interests and root its actions in its own constitutional authority and interpretation. If left to the Executive Branch, these varied interests may not be represented, and instead the interests and views of the President would remain the focal point in any litigation. Congress would be forced to endure situations in which an administration unenthusiastically supports its law or, alternatively, wait until the Executive Branch completely abandons its defense of the law in favor of its own constitutional interpretation.

Considering the power to defend as an inherent congressional power also does not invoke the types of concerns that influenced the Court to rule against the Act in *Bowsher*. In *Bowsher*, the Court found especially troubling the fact that the CG exercised exclusive judgment in suggesting budget reductions, and that the Act required the President to enforce suggestions of the CG as presented.<sup>210</sup> The Legislative Branch's defense of a statute differs in that

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<sup>206</sup> Cobb, *supra* note 13, at 225.

<sup>207</sup> *Id.* at 226.

<sup>208</sup> 273 U.S. 135, 174 (1927) ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.")

<sup>209</sup> *Id.* at 175.

<sup>210</sup> Abikoff, *supra* note 202, at 1541.

Congress's defense of a statute's constitutionality would have no binding effect on the Executive Branch. Instead, the Executive Branch, through the DOJ and Solicitor General, would still be able to advocate for its respective position as *amicus curiae*.<sup>211</sup> Thus, unlike in *Bowsher*, the mere defense of a statute does not bind the Executive Branch or determine how a law is to be executed. As such, Congress undertaking the defense of statutes would not infringe upon the duties of the Executive Branch and would not violate the separation of powers.

Even if not deemed to be an inherent power of Congress, the idea of the Legislative Branch defending statutes is nothing different than what has occurred for decades by both the House and Senate. As with the cases described above (*Myers*, *Chadha*) and many other examples (including the present DOMA case), the House and Senate legal counsels have litigated in defense of statutes, and “[no] court has ever held that these activities are out of bounds.”<sup>212</sup> The idea advanced by this Comment amounts to nothing more than taking this already-accepted, constitutionally permissible practice and making it the norm. The next Part describes one of many possible ways to implement the new norm that this Comment proposes.

#### IV. THE CORRECT “DEPARTMENT” FOR STATUTORY DEFENSE

Though the Ethics in Government Act of 1978 permits Congress to intervene when the Executive Branch declines to defend statutes,<sup>213</sup> this approach fails to adequately represent congressional interests and ensure a proper defense for a statute. This Part reviews the current response to executive nondefense, and then it offers a new approach to statutory defense that aims to alleviate the shortcomings present in the modern system.

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<sup>211</sup> See *supra* text accompanying notes 35–36.

<sup>212</sup> Frost, *supra* note 13, at 964–65. This does not include the numerous instances when these offices, or individual members, or groups of members filed *amicus* briefs in ongoing litigation—another practice that has never even been challenged. Cf. *Log Cabin Republicans v. United States*, Nos. 10-56634 & 10-56813, 2011 WL 2683238, at \*1 (9th Cir. July 11, 2011) (holding that “[t]he Government, of course, may refrain from defending the constitutionality of ‘any provision of any Federal statute,’” and that “the court may allow *amicus curiae* to participate in oral argument in support of constitutionality” (citing 28 U.S.C. § 530D(a)(1)(B)(ii) (2006))).

<sup>213</sup> Ethics in Government Act of 1978 § 706, 2 U.S.C. § 288e (2006) (authorizing, though not requiring, the House or Senate OLC to intervene, thereby creating an unpredictable system in which decisions to intervene are made on a case-by-case basis).



### A. *Current Congressional Passivity in Statutory Defense*

The idea of empowering the Legislative Branch to play a more active role in representing itself is not one of first impression. Indeed, the model employed presently arose in the post-Watergate era when Congress attempted to reassert itself amidst an expanding Executive Branch,<sup>214</sup> and the reasons for doing so echo those advanced by this Comment: “The Executive Branch, represented by the Justice Department, is in conflict with the Congress on many subjects. . . . If one believes that the separation of powers is fundamental . . . then having the Congress represented in litigation by the Justice Department is totally unacceptable.”<sup>215</sup> Yet while this model helps ensure that a statutory defense can be made available if the Executive Branch decides not to defend a statute, it allows for Congress to play only a reactive role in defending its laws.

The basis for the present model rests in the Ethics in Government Act of 1978.<sup>216</sup> The Act created the Senate Legal Counsel office (SLC)<sup>217</sup> for the purpose of providing defense, advice, and litigation support in matters related to its investigations and defense in civil suits.<sup>218</sup> Specifically in regard to defending statutes, the Act expressly permits the SLC to defend a statute when the constitutional power of Congress to make laws or the constitutionality of acts of Congress are challenged.<sup>219</sup> Shortly thereafter, a similar office emerged to handle many of the same duties for the House of Representatives.<sup>220</sup> And though both offices perform valuable services, each remains limited to only representing the interests of its respective chamber.

The most notable deficiency in the current functions of the House and Senate Legal Counsel offices is that, even with the presence of each office, Congress only possesses a secondary role in defending statutes. Despite the fact that the law calls upon the SLC to “defend vigorously when placed in

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<sup>214</sup> See Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, LAW & CONTEMP. PROBS., Spring 1998, at 47, 48 (noting that Congress created the Senate Legal Counsel office in 1978 in reaction to a need for representation in the post-Watergate era).

<sup>215</sup> Frost, *supra* note 13, at 950–51 (alteration in original) (internal quotation marks omitted).

<sup>216</sup> Pub. L. No. 95-521, §§ 701–716, 92 Stat. 1824, 1875–85 (codified as amended at 2 U.S.C. § 288 (2006)).

<sup>217</sup> See Tiefer, *supra* note 214, at 48.

<sup>218</sup> See *id.* at 49.

<sup>219</sup> See 2 U.S.C. § 288h (2006).

<sup>220</sup> See Tiefer, *supra* note 214, at 49.

issue . . . the constitutionality of Acts and joint resolutions of the Congress,”<sup>221</sup> Congress has relied upon the Executive Branch tradition of defending statutes<sup>222</sup> and reserved a role for itself only to the extent that the Executive Branch chooses to not defend a statute.<sup>223</sup> Presently, the only instances in which Congress plays the lead role in statutory defense is when the Attorney General notifies the SLC of an instance when the Attorney General or Department of Justice decides not to enforce or apply a federal law or not to defend a law against constitutional attack.<sup>224</sup>

Thus, Congress deprives itself of the ability to assert the constitutional interpretation that initially justified a piece of legislation by ceding its ability to defend the statutes it has passed. While this point remains moot so long as the Executive Branch remains loyal to Congress’s interpretations, a departmentalist approach to defending statutes—where each branch is permitted to adopt varying constitutional interpretations—accentuates the problem.

Additionally, whether a statute receives a defense remains in constant flux, as the Executive Branch may change its decision to defend based on the administration in office.<sup>225</sup> This scenario was illustrated by DOMA: DOMA passed overwhelmingly through Congress, was signed by a Democrat President, and the Clinton and Bush Administrations defended the law and advocated in its favor. However, the Obama Administration rejected these constitutional interpretations and President Obama’s interpretation took priority in the Administration’s nondefense.<sup>226</sup> The justification Congress employed to defend the law emerged only after Congress intervened following the recommendation of the Bipartisan Legal Advisory Group (BLAG).<sup>227</sup>

Even if the Executive Branch does defend a statute, no guarantee exists it will do so with the veracity and zealotry that Congress otherwise might.

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<sup>221</sup> 2 U.S.C. § 288h.

<sup>222</sup> *Supra* Part I.B.

<sup>223</sup> *See Days, supra* note 12, at 502.

<sup>224</sup> 2 U.S.C. § 288e.

<sup>225</sup> *See Waxman, supra* note 9, at 1084 (describing how President H.W. Bush declined to defend the Cable Television Act of 1992, but then how President Clinton took up the defense upon being elected).

<sup>226</sup> *See* Attorney General’s Letter, *supra* note 1 (recognizing that the DOJ has previously defended DOMA); *supra* Part II.C.

<sup>227</sup> Presumably, if the House were under Democrat control, the BLAG would have not made the same recommendation and DOMA would not have received a defense. Indeed, Minority Leader Pelosi voiced disapproval and even filed an amicus brief in opposition to the Advisory Group’s recommended defense for the statute. *See* Pelosi Amicus Brief, *supra* note 170.

Indeed, some see a weakened form of statutory defense as an example of the Executive Branch “using litigation as a form of post-enactment veto of legislation that the current administration dislikes.”<sup>228</sup> History has shown multiple administrations that have taken part in that very practice. For instance, in *Oregon v. Mitchell*,<sup>229</sup> Solicitor General Erwin Griswold defended a statute that President Nixon believed to be unconstitutional.<sup>230</sup> Though Griswold defended the statute’s constitutionality to the Court, his argument began by petitioning the Court to consider the fact that the President and Department of Justice viewed the law as unconstitutional.<sup>231</sup> Similar behavior occurred in *Buckley v. Valeo*.<sup>232</sup> There, Solicitor General Robert Bork argued on behalf of the Federal Elections Commission and the Attorney General as parties to the case, yet simultaneously filed a separate brief on behalf of the opposition.<sup>233</sup> In instances such as these, the Solicitors General went through the motion of defending a statute yet actively supported arguments contrary to the statute’s defense.<sup>234</sup> Because Congress was following the tradition of Executive Branch statutory defense, Congress’s only recourse in those instances was to file a brief as amicus curiae.<sup>235</sup>

The Executive Branch may also fail to put forth credible arguments when defending a statute.<sup>236</sup> Though this occurrence is difficult to sometimes show, the recent decisions of the Obama Administration in regard to DOMA Section 3 illustrate a good example. In a brief meant to defend DOMA, the Administration wrote that “the United States does not believe that DOMA is rationally related to any legitimate government interests in procreation and child-rearing and is therefore not relying upon any such interests to defend DOMA’s constitutionality.”<sup>237</sup> However, this was the exact rationale that had been cited in previous defenses of DOMA in litigation and by the House

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<sup>228</sup> See Days, *supra* note 12, at 502.

<sup>229</sup> 400 U.S. 112 (1970).

<sup>230</sup> See Waxman, *supra* note 9, at 1081 (noting that President Nixon believed Congress had no power to enact the Voting Rights Act).

<sup>231</sup> See *id.* at 1081–82.

<sup>232</sup> 424 U.S. 1 (1976) (per curiam).

<sup>233</sup> Waxman, *supra* note 9, at 1082.

<sup>234</sup> See *id.* at 1081–82.

<sup>235</sup> See Days, *supra* note 12, at 502.

<sup>236</sup> See *Defending Marriage: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 47 (2011) (statement of Edward Whelan, President, Ethics and Public Policy Center) [hereinafter *Defending Marriage Hearing*].

<sup>237</sup> Reply Memorandum in Support of Defendant U.S.’s Motion to Dismiss at 6–7, *Smelt v. United States*, No. SACV 09-00286 DOC (MLGx) (C.D. Cal. Aug. 24, 2009).

Judiciary Committee as an interest that Congress considered when it enacted DOMA.<sup>238</sup> Thus, the Executive Branch cannot always be trusted to articulate the strongest argument in favor of a law's constitutionality.<sup>239</sup>

Taken together, these reasons reflect why the current model of statutory defense does more in giving the President unfettered discretion over the defense and enforcement of statutes than it does in protecting Congress as an institution and the laws it passes. The abbreviated role that Congress plays in statutory defense under the current model leaves statutes overly vulnerable to attack and distorts the balance of powers between the Executive and Legislative Branches. To avoid the Legislative Branch's interpretation from being entirely diluted, and to ensure the interpretation that permitted a statute to pass remains intact, the Legislative Branch should undertake the primary responsibility of defending its own laws.

### *B. Congress Should Amend the Ethics in Government Act and Defend Itself*

This section proposes a model by which the Legislative Branch undertakes the predominate responsibility in defending statutes. In all situations the model *requires* the Legislative Branch to ensure each law that is challenged receives a zealous defense. To implement such a policy effectively, three substantive changes to the Act would be appropriate: (1) create an Office of Congressional Legal Services to be primarily responsible for statutory defense; (2) explicitly provide for when and how this office undertakes statutory defense; and (3) eliminate all exceptions to statutory defense as they apply to the Legislative Branch.

#### *1. Creating the Office of Congressional Legal Services*

The first substantive amendment to the Act should call for the creation of an Office of Congressional Legal Services (CLS) for the distinct purpose of defending the constitutionality of statutes. Before elaborating on this notion, it is vital to note that the creation of the CLS would not replace the House and Senate Offices of Legal Counsel. Both chambers benefit from having respective offices from which members may garner legal advice and assistance in the performance of their duties.<sup>240</sup> Instances arise when the individual

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<sup>238</sup> See *Defending Marriage Hearing*, *supra* note 236, at 14–15.

<sup>239</sup> Waxman, *supra* note 9, at 1079.

<sup>240</sup> See, e.g., *Office of General Counsel*, U.S. HOUSE REPRESENTATIVES, <http://www.ogc.house.gov/> (last visited May 12, 2013).

chamber and its members require separate representation or have institutional interests separate from its counterpart.<sup>241</sup>

Yet with the rise of competing constitutional interpretations from different branches under departmentalism, the CLS would be charged with the duty to defend the work of *the* Congress rather than its individual components. Because a presumption of constitutionality accompanies each law “passed [by] the House of Representatives *and* the Senate,”<sup>242</sup> the CLS would zealously represent that notion against competing constitutional interpretations.

As opposed to the current method of ad hoc representation,<sup>243</sup> the CLS would be the automatic, unified standard-bearer for the Legislative Branch’s coequal constitutional interpretation. All challenges to a law’s constitutionality would automatically be presented to the CLS, and the CLS would maintain full authority regarding how to proceed. For instance, if the CLS is wary of whether and how the Executive Branch would defend a statute, then the CLS would undertake the law’s defense. However, if the interests of the Executive and Legislative Branches align, the CLS may defer to the Executive Branch if it feels as if the law will be defended adequately. Regardless of the option chosen, the sole objective of the CLS would be ensuring that the constitutionality of a challenged law is adequately defended at the onset and through the conclusion of any litigation.

While litigation regarding the constitutionality of a statute may occur after changes in party leadership or composition, creating the CLS would provide a sense of continuity that would help minimize scenarios where partisan divides cause differing approaches to defending a law. For example, the CLS would invariably defend laws passed in a different congressional session than the current one. Though that defense may be different than the viewpoint prevalent within the present Congress (e.g., a law passed under Republican leadership is challenged after Democrats regain the majority), the present Congress would always possess the ability to render such a defense useless by passing a different law to reflect its changing views.<sup>244</sup>

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<sup>241</sup> *See id.*

<sup>242</sup> U.S. CONST. art. I, § 7, cl. 2 (emphasis added); *accord* *INS v. Chadha*, 462 U.S. 919, 944 (1983).

<sup>243</sup> *See* 2 U.S.C. § 288e (2006).

<sup>244</sup> Indeed, one of the striking elements of the DOMA litigation is that the Obama Administration decision not to defend the law occurred less than two years after Democrats held control over the White House and both houses of Congress. Rather than trying to undermine the law by not defending it in court, the Administration and Democrats in Congress could have revoked it through separate legislation during that time. The fact they

Additionally, other scenarios would arise where one house favors defending the law while the other favors nondefense. Forming the CLS will prevent a fragmented congressional response toward the statute's defense and instead provide a unified, assured defense. Despite the partisan frustrations this would cause on both sides of the spectrum at any given point, the consistency in defense provided by the CLS would allow for a more reputable representation—one that transcends party differences or agendas—that allows the CLS to develop a trusted relationship with the Court.

To further maximize its effectiveness and legitimacy, Congress should create the CLS to function in the same manner and with the same level of independence that the Office of the Solicitor General shares with the President, Attorney General, and various Executive agencies.<sup>245</sup> Indeed, this independence enables the Solicitor General to maintain a reputable, relatively nonpolitical stature, which allows his arguments to carry more weight and relevance when presented to the Court.<sup>246</sup> Creating a Legislative Branch office based on this example would help to counter the Executive Branch positions offered by the Solicitor General and promote the long-term institutional interests of Congress. Even if the Legislative Branch arguments are ultimately unsuccessful, the presence of competing interpretations would require both branches to put forth stronger, more complete arguments. Only in that situation could the Court make a conclusion “with assurance that it had considered the very best arguments that could be made in its defense.”<sup>247</sup>

In many ways, the Congressional Research Service (CRS) provides an initial vision that this Comment's proposed congressional office should follow. The CRS is a group of “approximately 675 employees includ[ing] lawyers, economists, reference librarians, and social, natural, and physical scientists”<sup>248</sup> that serves Congress by working by request for all congressional committees and members of Congress.<sup>249</sup> The CRS provides research, testimony, and consultations throughout the entire legislative process, including the formulation of ideas for legislation and analyzing the legality of a specific

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did not makes it seem even more likely that they are using the judicial system as the vehicle to achieving political ends without spending much political capital.

<sup>245</sup> See Days, *supra* note 12, at 493.

<sup>246</sup> See Marcott, *supra* note 5, at 1324–25 (describing the advantages the Solicitor General garners from his frequent appearances and familiarity in front of the Supreme Court).

<sup>247</sup> Waxman, *supra* note 9, at 1079.

<sup>248</sup> IDA A. BRUDNICK, CONG. RESEARCH SERV., RL33471, THE CONGRESSIONAL RESEARCH SERVICE AND THE AMERICAN LEGISLATIVE PROCESS 2 (2011).

<sup>249</sup> *Id.* at 5–6.

bill.<sup>250</sup> The purpose of the CRS is to create responsible, effective policy, and it achieves this by providing objective, nonpartisan, and confidential services to all members of Congress.<sup>251</sup> In the same way the CRS possesses institutional credibility by committing itself to providing objective, nonpartisan research, the CLS would also best protect the legal institutional interests of Congress.

The consolidation of such power in the CLS would present difficulties in preventing partisan agendas from dictating actions of the CLS. Thus, systems must be in place to ensure members of Congress maintain a relatively low level of authority over the CLS. Most important in this regard is the fact that, to a large extent, members must recognize that the CLS is to serve the institution of Congress and not individual parties or members. Much like the Solicitor General's reputation of independence derives largely from the fact that the President and members of the Executive Branch do not direct the Solicitor General's actions, the CLS must also be allowed to operate independently within the Legislative Branch. For instance, the fact that the CLS will be defending the constitutionality of a statute as it was passed will likely often put the CLS at odds with the ever-changing majorities and viewpoints predominant in Congress. If the CLS were to adapt its arguments based on these changing viewpoints, then its defense would become as fickle and unpredictable as the current system of Executive Branch defense. Thus, instead of attempting to alter how the CLS defends a statute, members of Congress must remain cognizant of the need for CLS independence and seek to pass new laws—rather than attempting to influence the CLS—to reflect any views they possess that differ with the CLS.

Additional safeguards can also be implemented in the formation of the CLS to further insulate it from political pressures. In terms of appointing a Legislative Branch official to oversee the CLS, Congress must provide a bipartisan mechanism to satisfy both parties and remain as politically neutral as possible. A potential method is for Congress to look toward the Bipartisan Legal Advisory Group<sup>252</sup> for a general framework, but then add additional safeguards to it. As it stands, the BLAG is comprised of five members of the

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<sup>250</sup> See *id.* at 6 (describing the role of the CRS at all stages of the legislative process).

<sup>251</sup> See *id.* at 2.

<sup>252</sup> See Press Release, John Boehner, Speaker, U.S. House of Representatives, Statement by House Speaker John Boehner (R-OH) Regarding the Defense of Marriage Act (Mar. 4, 2011), available at <http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=227372> (“Under House rules, the advisory group has the authority to instruct the non-partisan office of the House General Counsel to take legal action on behalf of the House of Representatives.”).

House leadership,<sup>253</sup> and it directs the House General Counsel's office to file an amicus brief or determine how a law is to be defended when the Executive Branch declines.<sup>254</sup> An improvement to this would be to convene a *legal* "Gang of Eight," including the leaders of the two parties from the Senate and House and the chairs and ranking minority members of the Senate and House Judiciary Committees.<sup>255</sup> Rather than giving the majority party ultimate control, which is the case with the BLAG, this partisan-neutral group would first reach a consensus on a proposed leader, and then that nominee would require approval by votes of both houses. Though impossible to rid such a process of partisan preferences completely, this method would help to isolate the process as much as possible. Not only would party leaders who presumably received input from their party members agree upon the nominee, but also the rigid standards suggested for CLS in the next subsection would minimize the partisan element surrounding this director's decisions.

Additionally, much like the Solicitor General hires deputies and attorney assistants, Congress should permit and provide a budget for the CLS director to appoint and hire similarly situated officials. Again, to ensure the office maintains its creditability and neutrality, either the legal Gang of Eight or the full Congress should reserve for itself oversight over the process. For instance, Congress could require a simple or supermajority approval for appointed deputy positions, while later entrusting such appointees to hire additional staff. Congress could also impose terms on positions within CLS so as to provide regular checks for approval and effectiveness of those serving.

## 2. *How CLS Should Operate*

To avoid encroaching on the rightful duty of the Executive Branch to enforce statutes, Congress's second amendment to the Ethics in Government

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<sup>253</sup> *Id.* ("The Bipartisan Legal Advisory Group is a five-member panel consisting of the Speaker of the House, Majority Leader, Majority Whip, Minority Leader, and Minority Whip.")

<sup>254</sup> See *McCarthy Statement on the Defense of Marriage Act*, CONGRESSMAN & MAJORITY WHIP KEVIN MCCARTHY, [http://kevinmccarthy.house.gov/index.php?option=com\\_content&task=view&id=453&Itemid=94](http://kevinmccarthy.house.gov/index.php?option=com_content&task=view&id=453&Itemid=94) (last visited May 12, 2013).

<sup>255</sup> The *Gang of Eight* is a colloquial term used to describe a set of eight leaders serving in the United States Congress. Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483, 504 (2010) ("The Gang of Eight consists of the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate."). Currently, the Office of Senate Legal Counsel implements something similar. The Senate legal counsel reports to the Joint Leadership Group of the Senate, which includes members of the leadership of both parties. See Frost, *supra* note 13, at 943.



Act must clarify how and when the CLS shall become involved in litigation. As earlier noted, the CLS responsibilities should closely mirror those of the Solicitor General, and the statute provides that the Solicitor General “may conduct and argue suits and appeals in the Supreme Court and . . . in the United States Court of Appeals for the Federal Circuit . . . in which the United States is interested.”<sup>256</sup> Thus, any amendment to the Ethics in Government Act must designate that the CLS argue on behalf of the United States *only* in matters where the constitutionality of statutes is challenged. This permits all prosecutorial matters and instances in which the execution of the law is challenged to remain the prerogative of the Executive Branch.

The clearest situation in which the CLS might become involved is when a constitutional issue is identified from the start of litigation. When this is the case, the CLS can involve itself at the outset. The CLS and Solicitor General can then serve as two distinct parties defending the separate claims in a single suit. The Solicitor General currently employs a practice similar to this when private parties litigate and the U.S. government has an interest in the outcome. For instance, the Solicitor General often receives time during oral arguments in front of the Court to express the position of the United States.<sup>257</sup>

Much more difficult is the scenario in which the constitutional issue arises in the midst of litigation that the Executive Branch was litigating on its own. Here, Congress will need to provide a way in which the constitutional issue can be appropriately severed from the substantive issue so that CLS can defend the constitutionality of the statute. While this might seem challenging, evaluating some European models of analyzing constitutional questions lends guidance.<sup>258</sup>

For instance, the Italian model represents a way in which the question of the constitutionality of a statute can be severed and decided separately from the initial enforcement of law. There, when a constitutional question arises, proceedings are stopped and the constitutional question is sent to the Italian Constitutional Court.<sup>259</sup> That Court then decides the constitutional question and sends it back to the original court so that the case may resume.<sup>260</sup> Similarly in America, under the proposed model, any constitutional question that arises can

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<sup>256</sup> 28 U.S.C. § 518(a)–(b) (2006).

<sup>257</sup> See *supra* text accompanying notes 30–31.

<sup>258</sup> See *supra* text accompanying notes 32–38.

<sup>259</sup> See Ferejohn & Pasquino, *supra* note 32, at 1688.

<sup>260</sup> *Id.*

be instantly assigned to the CLS for defense during the litigation. Once the constitutionality is decided, the case can either conclude or return to the Executive Branch to resume enforcement proceedings.

While separating the constitutional issue like this leads to a slower, more inefficient process, slightly adjusting this model helps resolve that issue. For example, permitting the CLS to defer to the Executive Branch to defend statutes for all routine, noncontroversial issues eliminates unnecessary wastes of time and resources. In other words, where the interests of the branches align, the CLS can simply allow the Executive Branch to defend the statute so as to prevent the issue from having to be litigated separately. Though this reverts back to the type of statutory defense that exists now, the difference is that the Legislative Branch dictates when the Executive Branch becomes involved and not vice versa. Further, CLS can reserve the ability to reenter the case if it deems the Executive Branch is providing an insufficient or erroneous defense.

Alternatively, in Germany and Spain, constitutional complaints can be filed after a case has been completely resolved by the courts.<sup>261</sup> At that point, a constitutional court reexamines the case as a whole for any constitutional issues or errors.<sup>262</sup> If a constitutional issue arises, the court may rule on it and decide whether the original decision can remain intact.<sup>263</sup> This type of system permits a variation of the canon of constitutional avoidance that is often employed by American courts and would limit constitutional questions from arising only where violations of the substantive law are found to exist.

Because defending the constitutionality of statutes does not fall under the scope of Executive Branch powers,<sup>264</sup> and because Congress is already permitted to argue or designate someone to argue on behalf of the United States in certain instances,<sup>265</sup> extending this power to the Legislative Branch in such instances will not encroach upon executive powers.

### *3. No Congressional Exceptions to Defend*

Lastly, Congress should amend the Ethics in Government Act so as to ensure the CLS must always provide a zealous defense to all laws. To that end, Congress should statutorily eliminate the two exceptions that the Executive

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<sup>261</sup> *Id.* at 1690.

<sup>262</sup> *Id.*

<sup>263</sup> *See id.*

<sup>264</sup> *See supra* Part II.C.

<sup>265</sup> *See* Ethics in Government Act of 1978 § 706, 2 U.S.C. § 288e (2006).

Branch has carved out in regard to its tradition of defending statutes.<sup>266</sup> For starters, neither exception adopted by the Executive Branch makes sense for the Legislative Branch to continue. More importantly, the emergence of departmentalism makes it vital for the CLS to represent the institutional interests of the Legislative Branch by consistently defending the constitutional interpretation that Congress adopted when they created the law.

First, the Legislative Branch need not refrain from defending statutes that the President perceives as encroaching on Executive Branch powers. While departmentalism permits the President to come to a conclusion regarding how a law affects his powers, it also allows for the CLS to make a countering determination that the law validly respects executive power. Thus, in cases where this constitutional issue is litigated, CLS should present the Legislative Branch interpretation. To be sure, this does not necessarily exclude the Executive Branch or render the Solicitor General's arguments moot. In many instances the Court may request the Solicitor General's position,<sup>267</sup> or the Solicitor General may still independently request time to orally present its arguments to the Court or file as *amicus curiae* in the case to present its own interpretation. In such a case, that situation actually mirrors examples like *Mitchell* and *Buckley* because the Executive Branch retains the ability to express its negative opinion regarding the law. The vital difference, however, is that under the proposed model the Legislative Branch interpretation is assured of receiving a complete and zealous defense.

The Legislative Branch should also refrain from creating an exception that permits nondefense if it believes the statute is unconstitutional. Though the Executive Branch utilizes that exception, inherent differences between the branches make it unnecessary for Congress to do the same. First, Congress passed the statute and should be called to vigorously defend its own work.<sup>268</sup> Second, and more importantly, Congress possesses a power absent in the Executive Branch: the power to repeal or amend the law. Thus, if Congress

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<sup>266</sup> See *supra* Part IIC.

<sup>267</sup> See *Days*, *supra* note 12, at 488.

<sup>268</sup> This could be in reference to the present session of Congress passing a statute, or to previous sessions that passed the statute with different leadership, members, and procedures. Either way, the institutional interests of Congress are served when defending a law that was passed and has yet to be amended or repealed. Though current members of Congress may not agree with laws passed in previous sessions, the future viability of the laws that current members pass relies on an expectation that Congress will carry out the proper procedure to effect statutory change.

believes a law to be unconstitutional, it should change the law by passing a bill through both houses and presenting it to the President for his signature.

Institutional hurdles certainly exist in overturning a law in this last instance. Institutional processes like filibusters and holdouts, not to mention a frequent lack of political coalition or agreement, prevent and delay laws from being passed. Yet just because Congress may not be in a position to change the law does not mean it should seek to void the present law through nondefense. Indeed, Congress may permit the CLS to advise members of Congress or testify at committee hearings regarding its belief in the unconstitutionality of a statute. But the CLS should not possess the ability to avoid defending the statute so as to avoid the same types of instances of nondefense that exist under the current system.

While ensuring statutory defense may seem positive to some, opponents will invariably object to Congress being forced into taking a constitutional position on every issue. Indeed, it may very well not be politically and ideologically expedient for the CLS to defend unpopular or outdated statutes, and certainly each party may attempt to force litigation in attempts to utilize the issue politically. Though the CLS will be insulated from members of Congress and the political pressures within each chamber, it will be impossible for members to prevent all negative attention surrounding the defense from being imputed onto them.<sup>269</sup>

Yet within this potential objection to the mandatory defense of statutes arise two additional positive benefits. First, forcing the CLS to take a constitutional position adds a layer of accountability and legitimacy on members of Congress as they pass legislation. While previous efforts attempted to do this through tactics like requiring Congress to specify the exact constitutional provision on which a proposed law was based,<sup>270</sup> creating the CLS will help ensure constitutional validity in the event of litigation and prevent the Legislative Branch from hiding behind the shield of executive statutory defense when constitutional questions arise. Second, the political pressures that mandatory defense cause will also likely force Congress to pass

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<sup>269</sup> The DOMA example yet again illustrates this point. While still defending the law, President Obama received much criticism from LGBT supporters to the extent that some commentators believe he was politically pressured into changing positions. Moreover, upon the House taking up defense of the bill, Democrats seized on the political opportunity and attempted to use it against Republican lawmakers. *See Defending Marriage Hearing, supra* note 236, at 48.

<sup>270</sup> *See* U.S. HOUSE OF REPRESENTATIVES R. XII (requiring a “statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution”).

bipartisan legislation. No longer can Congress sit back as the Executive Branch takes criticism; rather, members of Congress will need to endure political pressure or look to a compromise on the issue in question.

*C. Implications for the Executive Branch Relinquishing the Duty to Defend*

While this Comment has focused on the details and effects of the Legislative Branch undertaking the defense of statutes, attention must also be given to the implications that such a decision might have on the Executive Branch. Though the defense of statutes arose originally out of convenience,<sup>271</sup> the tradition continues to “foster[] comity” between the two branches.<sup>272</sup> Thus, replacing the Solicitor General’s role in statutory defense may cause tension between the two branches, especially in that it may pit them as adversaries in litigation regarding a statute’s constitutionality. Yet despite this, the Executive Branch possesses two legitimate reasons for allowing the Legislative Branch to assume the duty to defend.

First, relinquishing the duty to defend strengthens the Executive Branch by allowing the DOJ and Solicitor General to serve fully at the pleasure of the President. Whereas defending statutes often subjected the Solicitor General to the pressure of having to “interpret the law independently of the rest of the executive agencies he represents,”<sup>273</sup> the CLS will allow for the Solicitor General to more freely argue for the interests of the Executive Branch. Especially under departmentalist thought, where the President has a “responsibility to interpret the law *independently* from the Supreme Court,”<sup>274</sup> the Solicitor General “must project vigorously, albeit respectfully, the President’s distinctive constitutional voice.”<sup>275</sup> Not only must the Solicitor General represent the President’s position, but also he is uniquely able to do so because of the rapport he holds with the Court.<sup>276</sup> He appears most often and has a familiarity with the Court that would be better utilized on behalf of the Executive Branch.<sup>277</sup> Even if the CLS assumed the responsibility of defending statutes and was the main litigator in this regard, the Executive Branch could

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<sup>271</sup> *Supra* Part II.B.

<sup>272</sup> *See* Days, *supra* note 12, at 502.

<sup>273</sup> John O. McGinnis, *Principle Versus Politics: The Solicitor General’s Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 801 (1992) (book review).

<sup>274</sup> *Id.* at 802.

<sup>275</sup> *Id.*

<sup>276</sup> *See* Days, *supra* note 12, at 487–88.

<sup>277</sup> *See id.* at 487–89.

still file an amicus brief and request time at oral arguments<sup>278</sup> to represent the views of the President.

Second, the CLS's defense of statutes will deflect negative political attention away from the Executive Branch. Instead of being forced to defend a law with which the President or his party and supporters disagree, the Executive Branch can clearly and unequivocally defend the position it prefers. As previously mentioned, the fact that the Solicitor General acts relatively independently from the President and the rest of the Executive Branch often is not enough to prevent discontent from being cast upon the President. Completely stripping the Solicitor General and the Executive Branch of their role in statutory defense is the only way of separating the President from the action.

Thus, the Executive Branch actually has much to gain from allowing the Legislative Branch to defend the constitutionality of statutes. Not only will it be able to advocate the interests and positions of the President as they pertain to statutes, but it can also avoid the political mess often entailed in defending controversial laws with which it disagrees. Even if Congress were not to take action to amend the Ethics in Government Act and allow for Legislative Branch statutory defense, the Executive Branch should consider establishing a custom under which the Solicitor General defers to the Legislative Branch in instances of statutory defense.

#### CONCLUSION

Recent decades have seen the emergence of departmentalism and each branch taking it upon itself to render constitutional interpretations in the performance of its duties. One consequence has been the increasing trend of the Executive Branch to refrain from its tradition of defending the constitutionality of federal statutes when challenged in litigation. While some scholarship has analyzed the President's tradition of defending statutes and the recognized exceptions to that tradition, this Comment suggests that the Executive Branch's defense of statutes should be the exception and not the rule.

Thus, this Comment argues that the Legislative Branch should undertake the primary responsibility in defending federal statutes and, only when the

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<sup>278</sup> See SUP. CT. R. 28.

Legislative and Executive Branches agree upon how a statute is to be defended, should the Legislative Branch consider deferring to the Executive Branch for statutory defense. This Comment argues that the ability to defend statutes is inherent within Congress's Article I powers, that the Executive Branch tradition of defending statutes is not constitutionally mandated under Article II, and that allowing the Legislative Branch to put forward its own constitutional arguments would serve the institutional interests of Congress. By suggesting the creation of a Legislative Branch office capable of undertaking statutory defense, this Comment provides a mechanism through which courts can be presented with comprehensive arguments of a case from which they can make better, more informed decisions regarding a statute's constitutionality.

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