

## DEFENDING EXECUTIVE NONDEFENSE AND THE PRINCIPAL–AGENT PROBLEM

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**ABSTRACT**—Critics of the Obama Administration’s decision not to defend the Defense of Marriage Act argued that the President had a “duty to defend” the law and that the Executive Branch should serve as Congress’s agent in defending statutes in court. Both propositions are wrong. First, it does not make sense to think of the Executive Branch as Congress’s agent because, in the context of government action, there are multiple and changing principals and the Executive Branch is at once both principal and agent. Second, the President does not have an absolute duty to defend statutes in court. Proponents of the duty to defend argue that defense of the law is part of the President’s constitutional obligation to take care that the laws are faithfully executed and that it is untoward for the government to speak with more than one voice in court. This Article argues that defense is distinct from execution, and that in some contexts, it is helpful for the government to speak with more than one voice. The Article then argues that where the Executive Branch has questions about a statute’s constitutionality, it should not defend the law because nondefense better serves our adversarial system of justice and better enables the Executive Branch to protect its own interests. Moreover, where the Executive Branch does not defend, Congress or court-appointed counsel can do so in its place. Finally, this Article suggests that recognizing that classic principal–agent principles do not apply to executive branch action may have implications for other contexts.

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INTRODUCTION

Every day in different forums and contexts around the world, individuals and entities act on behalf of the “United States.” Generally, such actions are uncontroversial and should be so—these individuals and entities are faithfully acting on behalf of the “United States” to execute the nation’s laws and policies. It is natural to think of these executive branch representatives as simple agents, implementing law and policy developed by a distinct principal. But the Executive Branch is no simple agent,<sup>1</sup> and, even if it were, there is generally no distinct principal capable of providing sustained control over its actions.<sup>2</sup> In other words, classic principal–agent principles do not work well in the context of executive branch action. That fact may have important implications for how we think about executive branch action in many contexts,<sup>3</sup> but this Article focuses on one such

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<sup>1</sup> See *infra* notes 137–43 and accompanying text. Although the Executive Branch is often responsible for acting on behalf of the “United States” as a whole, it also must exercise its own constitutional obligations. See U.S. CONST. art. II, § 3 (providing that the President “shall take Care that the Laws be faithfully executed”).

<sup>2</sup> See *infra* notes 123–33 and accompanying text.

<sup>3</sup> See *infra* Part V.

context—the Executive Branch’s so-called “duty to defend” challenged statutes.

By statute, “the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested” is, with certain limitations, “reserved to officers of the Department of Justice,”<sup>4</sup> and United States attorneys are directed to “prosecute for all offenses against the United States; [and] prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned” that arise in their districts.<sup>5</sup> These statutes are commonly understood to confer upon the Department of Justice (DOJ or Department) and other federal lawyers the responsibility to serve as the United States’ agents in court. Generally, such assumptions of simple agency are, even if incomplete, also unproblematic; there is generally little controversy about the actions the DOJ takes (or fails to take) in the name of the “United States.” But sometimes there is.

Earlier this year, the DOJ announced that it would no longer defend the Defense of Marriage Act (DOMA),<sup>6</sup> which defines the word “marriage” for purposes of federal law to mean “only a legal union between one man and one woman as husband and wife.”<sup>7</sup> The Department explained that the President had concluded that the statute was unconstitutional and thus, despite the “longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense,” this was the “rare case” in which defense was not appropriate.<sup>8</sup>

Although gay rights proponents celebrated the decision, many others condemned the Obama Administration. These critics of the Administration made two related arguments. First, they argued that the President has a duty to defend challenged statutes in court and that President Obama abdicated

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<sup>4</sup> 28 U.S.C. § 516 (2006).

<sup>5</sup> *Id.* § 547(1)–(2).

<sup>6</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C).

<sup>7</sup> 1 U.S.C. § 7.

<sup>8</sup> Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives 5 (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>. Prior to that announcement, the Obama Administration had been defending DOMA in court and had been criticized for doing so. *See, e.g.,* Paul Hogarth, *Obama’s DOMA Defense Unacceptable*, HUFFINGTON POST (June 15, 2009, 12:49 PM), [http://www.huffingtonpost.com/paul-hogarth/obamas-doma-defense-unacc\\_b\\_215718.html](http://www.huffingtonpost.com/paul-hogarth/obamas-doma-defense-unacc_b_215718.html) (criticizing the Administration for “advanc[ing] legal arguments that—if pursued by the courts—could greatly damage gay and lesbian rights”). Earlier in the Administration, the President and his advisers also confronted the question whether to defend in court the ban on openly gay men and women serving in the military. *See* 10 U.S.C. § 654 (2006). In that case, “the Obama administration’s Justice Department . . . continued with appeals, saying [it was] bound by a ‘duty to defend’ the laws even if it [did not] like them.” Devin Dwyer, “Don’t Ask, Don’t Tell”: Is Obama Administration Bound to Defend Law It Opposes?, ABC NEWS (Oct. 21, 2010), <http://abcnews.com/Politics/dont-debate-obama-administrations-legal-defense-gay-ban/story?id=11928405>.

this responsibility when he abandoned DOMA's defense.<sup>9</sup> According to these critics, the President's decision laid the groundwork for subsequent presidents to abandon the legal defense of statutes with which they disagree as a matter of policy. For example, one prominent law professor who opposes DOMA nonetheless criticized the Administration for declining to defend it, arguing that the Administration's decision "sets a terrible precedent that could well come back to haunt those who are cheering the president's decision."<sup>10</sup> Second, they argued that the Executive Branch was ignoring its proper role vis-à-vis Congress. Specifically, they argued that the Executive Branch's proper role in defending legislation is that of Congress's agent, and that the only way it could be a faithful agent was to defend the legislation. One commentator, for example, argued that the Administration's decision "changes the role of the Executive branch in defending litigation from the traditional dutiful servant of Congress to major institutional player with a great deal of discretion."<sup>11</sup>

Neither of these criticisms is persuasive. First, although commentators have long invoked the idea that the Executive Branch has a duty to defend challenged statutes, no one has ever meaningfully explained precisely what that duty is or where it comes from. There may be a reason for this.

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<sup>9</sup> See, e.g., *Newt Gingrich Discusses Potential Obama Impeachment*, HUFFINGTON POST (Feb. 25, 2011, 6:42 PM), [http://www.huffingtonpost.com/2011/02/25/newt-gingrich-obama-impeachment-palin\\_n\\_828506.html](http://www.huffingtonpost.com/2011/02/25/newt-gingrich-obama-impeachment-palin_n_828506.html) ("House Republicans . . . should pass a resolution instructing the president to enforce the law and to obey his own constitutional oath, and they should say if he fails to do so that they will zero out [defund] the office of attorney general and take other steps as necessary until the president agrees to do his job." (alteration in original) (quoting former Speaker of the House and Republican presidential candidate Newt Gingrich)).

<sup>10</sup> Adam Winkler, *Why Obama Is Wrong on DOMA*, HUFFINGTON POST (Feb. 24, 2011, 12:01 PM), [http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom\\_b\\_827676.html](http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom_b_827676.html) ("Don't be surprised if a President Palin points to Obama's decision when announcing her refusal to enforce and defend the landmark healthcare reform law because, in her view, the individual mandate is unconstitutional."). Although I focus in this Article on the federal government, this issue arises at the state level as well. Most recently, the litigation surrounding Proposition 8, the California ballot initiative that overturned an earlier California Supreme Court decision recognizing a right to same-sex marriage under the California Constitution, gave rise to the same questions about the Executive Branch's responsibility to defend the constitutionality of challenged statutes. See *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008). In that case, then-Governor Arnold Schwarzenegger and then-Attorney General Edmund Gerald Brown decided not to defend the Proposition and, like President Obama, were subject to both praise and criticism for their decision. See generally Vikram David Amar, *Lessons from California's Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General*, 59 EMORY L.J. 469 (2009) (discussing Attorney General Brown's decision not to defend Proposition 8 and asking whether there are lessons in that decision for the federal government). And in Wisconsin, Governor Scott Walker told the courts that he could no longer defend the state's domestic partner registry because he believed it was unconstitutional. See Todd Richmond, *Walker: Domestic Partner Law Is Unconstitutional*, WIS. L.J. (May 16, 2011, 9:14 PM), <http://wislawjournal.com/2011/05/16/walker-domestic-partner-law-is-unconstitutional/>.

<sup>11</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/>.

Although it is almost certainly prudent for the DOJ to generally defend challenged statutes, it is not at all clear that it has a *duty* to do so in all circumstances, and the principal justifications for such a duty do not support its existence. Some commentators have assumed that because the Executive Branch is responsible for enforcing the law,<sup>12</sup> it must be responsible for defending it as well.<sup>13</sup> But as I argue below, there are meaningful differences between enforcement and defense, and a duty to do the former does not necessarily imply a duty to do the latter. There also seems to be a deep-seated belief that the United States should speak with “one voice” in court. Chief Justice Roberts recently gave vivid expression to this belief, explaining that the “difference between a suit against the State brought by a private party and one brought by a state agency . . . is the difference between eating and cannibalism; between murder and patricide.”<sup>14</sup> But it is unclear why this should be. When different parts of the government have competing views—as they inevitably will—there is no reason why the DOJ should have the exclusive authority to determine what the government’s position will be in court. Rather, it makes sense to allow different parts of the government to present their views and to let the courts, which are supposed to be the final arbiters of the constitutionality of federal statutes, determine which is right.<sup>15</sup>

Second, the Executive Branch cannot be—and should not be—simply Congress’s dutiful agent. Indeed, there are meaningful limits to what simple principal-agent principles can teach us when applied to executive branch

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<sup>12</sup> See U.S. CONST. art. II, § 3; see also *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[A]n agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” (quoting U.S. CONST. art. II, § 3)). See generally James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523 (1981) (examining “the nature, scope, and effects of prosecutorial power” and arguing against “its present expanded form”).

<sup>13</sup> See *infra* Part II.C.

<sup>14</sup> *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1649 (2011) (Roberts, C.J., dissenting).

<sup>15</sup> See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); see also *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (reaffirming the “judicial authority to determine the constitutionality of laws, in cases and controversies”). To be sure, there is substantial debate within the academic community about whether the judiciary *should* play this role, see *infra* note 162, but “[j]udicial supremacy has been, to an increasing degree over time, the practice for the better part of the two centuries since *Marbury*,” Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 422 (2003). I therefore take as my starting point the assumption that the courts are the final expositors of constitutional meaning. But this position nonetheless allows for the Executive Branch to develop and advance—within limits—its own interpretation of the Constitution.

action. Recognizing these limits may have broad implications for how we think about executive branch action in many contexts, but it also offers specific lessons about the role of the Executive Branch in defending challenged statutes. First, in the context of executive branch action, the absence of a single principal and the existence of intertemporal complications mean that there will often be situations in which there is no principal capable of exercising sustained control over the agent's actions. In other words, the Congress and the President that enacted a law at  $t_1$  may not be around to direct its execution (or provide checks against its mis-execution) at  $t_2$ .<sup>16</sup> In the duty-to-defend context, these lessons remind us that we cannot necessarily assume that the current Executive Branch and Congress will be inclined to defend a law enacted by a previous Executive Branch and Congress.<sup>17</sup> Second, the Executive Branch is at once both principal *and* agent. The Executive Branch plays a role in the enactment of legislation through the presentment process, and its various agencies are generally supposed to make substantive policy through the broad delegations of power they are granted. The Executive Branch is thus supposed to have its own institutional views and interests, at least in some cases. Recognizing these facts helps make clear that the Executive Branch is not simply Congress's agent, and it should not defend challenged statutes for that reason.

This does not mean that the Executive Branch should never defend challenged statutes or even that it should rarely do so. My point is only that it need not *always* do so and that we should think critically about the circumstances in which executive nondefense is preferable to executive defense. In the remainder of this Article, I argue that the Obama Administration was correct not to defend DOMA because the Executive Branch should not defend challenged statutes when it believes that the statute is unconstitutional, or even has questions about the statute's constitutionality. By Executive Branch, I mean the President or DOJ attorneys in cases in which the President is not personally involved. Although there are many interesting questions about the internal dynamics

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<sup>16</sup> See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2359 (2006) (“[I]f there is a problem with sweeping delegations, it would seem to be primarily a matter of time inconsistency. Patterns of party control change periodically, but many broad delegations passed under unified government stay in effect indefinitely, until the statutes are revised or repealed.”).

<sup>17</sup> It seems certain, for example, that a Democrat-controlled House would have declined to defend DOMA. See, e.g., Felicia Sonmez & Ben Pershing, *Boehner Moves to Defend Gay-Marriage Ban*, WASH. POST, Mar. 5, 2011, at A2 (quoting House Minority Leader Nancy Pelosi as saying, “I oppose Speaker Boehner’s effort to put the House in the position of defending this indefensible statute.”). Indeed, when the House Bipartisan Legal Advisory Committee voted to defend the statute, the measure passed by a 3–2 party-line vote. See Letter from Rep. Nancy Pelosi, Democratic House Leader, to Rep. John Boehner, Speaker of the House, U.S. House of Representatives (Mar. 11, 2011), available at <http://pelosi.house.gov/news/press-releases/2011/03/pelosi-letter-to-speaker-boehner-on-house-counsel-defense-of-doma.shtml>.

by which the Executive Branch determines its legal views on questions,<sup>18</sup> I here assume that the Executive Branch has a settled view that is consistent with the views of the President and his political appointees.<sup>19</sup>

My position will, of course, seem unexceptionable to those who believe that the Executive Branch is an equal and *independent* interpreter of the Constitution, free to act on its own views of the Constitution, whatever the courts might have to say.<sup>20</sup> If the Executive Branch need not enforce statutes that it believes are unconstitutional, it certainly need not defend them. But one need not agree that the Executive Branch is free to disregard the dictates of the courts to think that it can—and *should*—sometimes decline to defend the constitutionality of challenged statutes in court. Indeed, I start from the premise that the courts are the final arbiters of constitutional questions,<sup>21</sup> and I argue that executive nondefense may actually facilitate, rather than undermine, judicial resolution of disputes.

After all, where the Executive Branch has questions about a statute's constitutionality, entrusting it to be the United States' agent in court may undermine the purposes normally served by our adversarial system of justice. Whatever the imperfections of that system,<sup>22</sup> our commitment to adversarialism reflects a long-held belief that competing parties will facilitate the courts' search for truth and their ability to reach the best legal outcome, and our system's commitment to adversarialism means that it relies in substantial part on adversarial parties. If the purported proponent of the statute does not actually believe that it is constitutional and is unwilling

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<sup>18</sup> There are, for example, interesting questions about the internal processes by which conflicts within the Executive Branch are resolved and what role the President should or must play in those conflicts. There are also interesting questions about whether the DOJ should consider anew the constitutionality of every statute it is called upon to defend or whether it should instead confer a presumption of constitutionality on validly enacted legislation. If the latter, the question then becomes how it should determine which statutes are selected for special review and what role, if any, the President should or must play in that process. These are questions that I hope to take up in the future.

<sup>19</sup> Cf., e.g., Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1194–95 (1994) (“[T]he President sits atop the regulatory system as the leader of the federal bureaucracy. If anyone is positioned to coordinate diffuse regulatory policy, it is the President, as leader of the executive branch.”); George F. Fraley, III, Note, *Is the Fox Watching the Henhouse?: The Administration's Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L.J. AM. U. 1215, 1233 (1996) (“The Solicitor General is appointed by the President who is likely to select a candidate with similar political and philosophical views.”).

<sup>20</sup> See *infra* note 162 and accompanying text. Indeed, relying in part on this view, Neal Devins and Saikrishna Prakash have recently argued that the executive branch has no duty either to defend or enforce challenged laws. See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509 (2012).

<sup>21</sup> See *infra* notes 162–66 and accompanying text.

<sup>22</sup> See, e.g., Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447 (2009); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011); Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907 (2011).

to make the strongest arguments in support of its constitutionality, it undermines that system and the benefits it is supposed to promote.

To be sure, attorneys often offer zealous arguments in support of positions with which they disagree. But the DOJ is not the same as private counsel, hired solely to promote the interests of a client. As noted above, the Executive Branch will often have its own legal views, and it should be able to present those views in court to ensure the courts have the benefit of the Executive Branch's most considered legal views, to ensure the public knows what the Executive Branch's views are, and to preserve the Executive Branch's institutional relationship with the courts.

In the absence of executive defense, a statute need not—and should not—go undefended; it should be defended either by Congress or by outside counsel appointed by the courts. After all, the United States still has an interest in seeing its law defended. The point is simply that the Executive Branch need not be the one defending it.

Recognizing that there will sometimes be complications in asking the Executive Branch to act as agent for the whole also suggests a need to give more sustained thought to other contexts in which complications may arise because the Executive Branch—one component part of the United States—is supposed to act as agent for the whole. The “United States” is, after all, many different things in different contexts: it is the Executive Branch; it is the Congress; it is the Judiciary; it is “We the People.” It is even governments that have acted in the past. In different contexts, these component parts—alone or in combination—operate to determine what the law and policy of the “United States” should be. And although it necessarily falls to some subset of those parts to act on behalf of the whole, too little attention has been paid to the problems that this reality can present, including the danger that the Executive Branch may arrogate power to itself by purporting to act on behalf of the whole even when it has no authority to do so. The specific questions raised by executive branch action (or inaction) will vary across contexts, but a general lesson of the duty-to-defend question—that simple principal-agent principles do not apply neatly to executive branch action—may have larger lessons that extend beyond the duty to defend.

In Part I, I provide some background on the Executive Branch's role in litigating for the United States in general and in defending challenged statutes in particular. I then consider the first of the criticisms leveled against the Obama Administration—the idea that the Executive Branch has a duty to defend challenged statutes. I discuss the two most traditional justifications for that duty and explain why, in my view, neither establishes that the Executive Branch has an absolute duty to defend challenged statutes in all circumstances.

In Part II, I turn to the other criticism leveled against the Obama Administration—that the Executive Branch should act as simple agent for Congress in the context of defending statutes in court. I begin by describing

the classic principal–agent relationship and then identify two reasons why classic principal–agent principles do not work when applied to executive branch action: (1) the existence of many and changing principals and (2) the fact that the purported agent is both agent and principal. I then apply those lessons to the duty-to-defend context.

Having concluded that the Executive Branch should not always defend challenged statutes, I turn in Part III to the question of whether it ought to do so when it has questions about the statute’s constitutionality. I argue that it should not defend in such a circumstance because doing so threatens to undermine our adversarial system and compromises the Executive Branch’s ability to protect its own institutional interests. In Part IV, I suggest alternative approaches to the executive defense of challenged statutes and consider some objections to these alternatives. Most significantly, I consider the danger that the United States’ laws will be left undefended. As I explain, my approach does not give rise to that concern, but ameliorates it by inviting more parties to take up the defense of challenged statutes when the Executive Branch may not be in the best position to do so.

In Part V, I look beyond the duty to defend to the larger lessons that controversy can teach us, particularly once we recognize the complications inherent in applying classic principal–agent principles to executive branch action. Specifically, we need to pay more attention to the complications that can arise when a part of the United States is supposed to act as agent for the much more complicated whole. Recognizing that fact does not tell us how to address the potential conflicts that may arise in different contexts, but it does at least ensure that we are asking the right questions.

#### I. THE “DUTY TO DEFEND”

The Executive Branch and, more specifically, the DOJ, have long been charged with acting for the United States in the defense of challenged statutes, just as they generally act for the United States in most litigation. Traditionally, the Executive Branch has declined to defend the constitutionality of statutes in only very limited circumstances: where the President concluded that the statute was unconstitutional,<sup>23</sup> where it was clearly unconstitutional under existing Supreme Court precedent,<sup>24</sup> or where “the statute . . . infringe[d] on the constitutional power of the Executive.”<sup>25</sup> The Executive Branch has also maintained that “a President may decline to defend a statute where no ‘respectable’ [or ‘reasonable’] argument can be

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<sup>23</sup> See, e.g., 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, 607 (1997).

<sup>24</sup> See, e.g., *id.* at 608 (discussing President Kennedy’s decision not to defend “a separate-but-equal provision of a law that provided federal funding for racially segregated hospitals”).

<sup>25</sup> The Attorney General’s Duty to Defend the Constitutionality of Statutes, 43 Op. Att’y Gen. 325, 325 (1981).

advanced in its support.”<sup>26</sup> The standard is supposed to be a stringent one, and although the Executive Branch has carefully preserved its authority not to defend challenged statutes, it has also consistently acknowledged a general duty to do so.<sup>27</sup>

It was this duty that critics of the Obama Administration’s DOMA decision used to challenge the President’s claim that the DOJ could properly decline to defend a statute that the President believed to be unconstitutional. But although the Executive Branch and commentators have long acknowledged the Executive Branch’s duty to defend challenged statutes, the precise scope and source of this duty has never been clear. In this Part, after providing some background on the Executive Branch’s role as the United States’ agent in court and the circumstances in which the duty to defend can arise, I examine this so-called duty and argue that neither of the two principal justifications for such a duty support its existence.

#### A. *Executive Branch as the United States*

Since the Judiciary Act of 1789, the Executive Branch has been tasked with the appointment of “person[s] learned in the law to act as attorney[s] for the United States.”<sup>28</sup> In 1870, the DOJ was established “to eliminate the reliance on private lawyers in litigation” and “to centralize the [Executive Branch’s] counseling function.”<sup>29</sup> Although the goals of centralization were not fully realized then, they came to fruition with the New Deal when “the modern framework was put in place.”<sup>30</sup> At that point, President Roosevelt issued an executive order that “transferred to the Department of Justice” “functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of

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<sup>26</sup> Gussis, *supra* note 23, at 610.

<sup>27</sup> In letters to the Senate Legal Counsel advising the Senate that the DOJ would not be defending a statute in court, “Attorney General Griffin Bell closed his letters with the following statement: ‘The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the challenged statute.’” Drew S. Days III, Lecture, *In Search of the Solicitor General’s Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 503 (1995) (quoting Letter from Attorney Gen. Griffin Bell to Sen. Robert Byrd 2 (May 8, 1979)).

<sup>28</sup> 1 Stat. 73, 92 (1789). The Judiciary Act also created the office of “attorney-general for the United States, . . . whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned.” *Id.* at 93.

<sup>29</sup> Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 559–60 (2003) (emphasis omitted).

<sup>30</sup> *Id.* at 559–60 (noting that the Executive Branch’s management of the United States’ litigation remained “diffuse and decentralized” until the twentieth century).

supervising the work of United States attorneys, marshals, and clerks in connection therewith.”<sup>31</sup>

Today, “the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested . . . is reserved to officers of the Department of Justice.”<sup>32</sup> The DOJ carries out these responsibilities under the auspices of the Attorney General, who is given the responsibility to “supervise all litigation to which the United States, an agency, or officer thereof is a party”<sup>33</sup> and the power to send “[t]he Solicitor General, or any officer of the Department of Justice . . . to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”<sup>34</sup> As the Supreme Court has explained, the Attorney General “is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences, be faithfully executed.”<sup>35</sup>

Central to the contemporary mission of the DOJ is the “defen[se] [of] the interests of the United States according to the law.”<sup>36</sup> By virtue of this statutory responsibility, the DOJ employs thousands of attorneys to represent the “United States” at all levels of the federal judicial system.<sup>37</sup> In some cases, the “United States” begins as a named party, prosecuting the accused or defending against a legal claim; in others, the “United States” technically begins as a stranger to the case, but intervenes to protect its interests;<sup>38</sup> and finally, in still others, the United States never formally becomes a party, but nonetheless shares its views with the court as an amicus.<sup>39</sup>

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<sup>31</sup> Exec. Order No. 6166, § 5 (1933), *reprinted as amended in* 5 U.S.C. § 901 (2006). President Wilson had earlier made a similar attempt, “but the change was largely ineffective and, in any event, temporary.” Neal Devins & Michael Herz, *The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205, 207 n.8 (1998).

<sup>32</sup> 28 U.S.C. § 516 (2006). The statute does provide that other statutory provisions may trump this reservation in particular cases. *See id.*

<sup>33</sup> *Id.* § 519.

<sup>34</sup> *Id.* § 517.

<sup>35</sup> *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922); *see also* Devins & Herz, *supra* note 29, at 560 (“In general, then, the Department of Justice is the litigator for the United States and its administrative agencies. Agencies may not employ outside counsel for litigation and must refer all matters to DOJ.” (footnote omitted)).

<sup>36</sup> U.S. DEP’T OF JUSTICE, U.S. DEPARTMENT OF JUSTICE OVERVIEW 1 (2011), *available at* <http://www.justice.gov/jmd/2012summary/pdf/fy12-bud-summary-request-performance.pdf>.

<sup>37</sup> *See id.* at 3.

<sup>38</sup> *See* § 2403(a) (allowing the United States to intervene to defend the constitutionality of a federal statute).

<sup>39</sup> *See, e.g.,* Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 213 (2009) (“Today, as much as forty-five percent of the Solicitor General’s argumentation is through amicus submission.”).

Whatever its point of entry, the Executive Branch's influence on judicial decisionmaking is often significant. It may be the "province and duty of the judicial department to say what the law is,"<sup>40</sup> but the Executive Branch often plays a significant role in helping the judiciary make that determination.<sup>41</sup> Executive branch lawyers appearing in federal courts throughout the judicial system facilitate courts' resolution of disputes by providing what are purportedly the United States' views on a variety of issues, ranging from fine questions of statutory interpretation to significant questions of constitutional law, and identifying the potential consequences that might result from the courts' decisions.<sup>42</sup>

### B. *The Duty to Defend*

Although commentators generally suggest that the duty to defend is a monolithic concept, a fixed obligation of the Executive Branch that always arises in exactly the same way and carries with it exactly the same responsibilities, there are at least three different contexts in which the duty to defend arises.

1. *The Trial Court.*—When a lawsuit is filed that challenges the constitutionality of a statute, the government and government officials will often be named as defendants.<sup>43</sup> In such cases, the government has an obligation to file an answer or otherwise respond to the lawsuit, lest it lose the case by default. In such cases, defending the statute will be an inevitable part of the general defense of the lawsuit, and it is at this stage of the litigation that the Executive Branch will generally lay the foundation for defending the statute's constitutionality, compiling the factual evidence and

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<sup>40</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>41</sup> See Todd Lochner, Note, *The Relationship Between the Office of Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549, 561 (1993) ("By far the most frequent amici before the Court, the United States is also one of the most successful. On average, the Office wins seventy-five percent of the cases in which it participates as amicus curiae . . . ." (footnote omitted)).

<sup>42</sup> Cf. Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1338 (2010) ("[T]he Solicitor General's participation in the Supreme Court's docket has become nearly pervasive. . . . [T]he Solicitor General has been participating in seventy-five percent of the merits cases since the mid-1990s, though increasingly in cases where the government itself is not a party."); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 782 (2000) ("[T]he interests of the executive branch and of Congress are nearly always represented in the Supreme Court by the Solicitor General . . . .").

<sup>43</sup> See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (Commonwealth of Virginia suing the Secretary of the U.S. Department of Health and Human Services to challenge federal health care reform); *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part* 132 S. Ct. 2492 (2012) (U.S. DOJ suing the State of Arizona to challenge Arizona's controversial immigration statute).

legal arguments that will enable it to make the strongest possible case for the statute's constitutionality.<sup>44</sup>

The Obama Administration's decision not to defend DOMA arose at just this stage in the litigation in cases in the Southern District of New York and the District of Connecticut.<sup>45</sup> Although the DOJ had previously defended the statute,<sup>46</sup> it explained that it had done so in jurisdictions in which there was binding precedent holding that laws that discriminate on the basis of sexual orientation are only subject to rational basis review.<sup>47</sup> The Second Circuit, by contrast, did not have such precedent,<sup>48</sup> and the Department and the President determined that such laws should be subject to heightened scrutiny and that DOMA was unconstitutional when subject to that scrutiny.<sup>49</sup>

Thus, while recognizing that "the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense," the Department explained that "[t]his is the rare case where the proper course is to forgo the defense of this statute."<sup>50</sup> The Department offered two possible explanations for its decision, but did not make clear whether both were necessary. First, it noted that "the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a 'reasonable' one."<sup>51</sup> Second, it noted that "the Department has declined to defend a statute 'in cases in which it is manifest that the President has concluded that the statute is unconstitutional,' as is the case here."<sup>52</sup>

At the end of his letter to the Speaker of the House, the Attorney General advised that "[a] motion to dismiss in the [relevant] cases would be

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<sup>44</sup> Although the trial court is supposed to establish the factual record on which the case will be decided, that is often not the case. See Gorod, *supra* note 22, at 28–35.

<sup>45</sup> See Complaint for Declaratory and Injunctive Relief, *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-01750-VLB (D. Conn. Nov. 9, 2010); Complaint, *Windsor v. United States*, No. 10-cv-8435 (S.D.N.Y. Nov. 9, 2010).

<sup>46</sup> See, e.g., *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub nom. Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012).

<sup>47</sup> See Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives, *supra* note 8, at 1–2 ("Previously, the Administration has defended [DOMA] Section 3 in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.").

<sup>48</sup> See *id.* at 2 ("These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue.").

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

<sup>50</sup> *Id.* at 5.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (quoting Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1083 (2001)).

due on March 11, 2011,<sup>53</sup> so that Congress could continue defending the statute if it were inclined to do so. It was. Just days before the motion to dismiss was due, the House (specifically, the House's Bipartisan Leadership Advisory Group, by a 3–2 party-line vote) decided to fill the vacuum created by the Department's decision not to defend the statute.<sup>54</sup> The House Speaker explained that “[t]he constitutionality of this law should be determined by the courts—not by the president unilaterally—and this action by the House will ensure the matter is addressed in a manner consistent with our Constitution.”<sup>55</sup> The House's retained counsel (a former Solicitor General then in private practice<sup>56</sup>) thus assumed responsibility for developing the record and legal arguments that the courts will use to determine the constitutionality of DOMA.

2. *On Appeal.*—If the Executive Branch had continued to defend DOMA in the district courts, its obligation to defend the statute would not necessarily have come to an end when the district court cases did. The duty to defend arguably also includes the obligation to appeal adverse trial court decisions to appellate courts and to petition the Supreme Court to grant certiorari in cases where there is an adverse decision in the courts of appeals. After all, in the absence of such an appeal, the challenged law is, at least for some purposes and in some places, void.

But some commentators have suggested that there may not be a duty to appeal, even if there is a duty to defend in the trial court. Former Solicitor General Ted Olson, for example, has suggested that the Executive Branch

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<sup>53</sup> *Id.* at 6 (“Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases.”).

<sup>54</sup> See Molly K. Hooper, *House Leaders Vote to Intervene in DOMA Defense*, THE HILL (Mar. 9, 2011, 6:43 PM), <http://thehill.com/blogs/blog-briefing-room/news/148521-house-leaders-vote-to-intervene-in-doma-defense> (“In a party-line vote of 3-2, the five-member BLAG . . . gave the House general counsel the authority to retain outside counsel to defend the Defense of Marriage Act (DOMA).”); see also Carolyn Lochhead, *Nancy Pelosi Asks John Boehner How Much DOMA Litigation Will Cost*, SFGATE POLITICS BLOG (Mar. 11, 2011, 12:46 PM), [http://www.sfgate.com/cgi-bin/blogs/nov05election/detail?entry\\_id=84843#ixzz1GgMd92ov](http://www.sfgate.com/cgi-bin/blogs/nov05election/detail?entry_id=84843#ixzz1GgMd92ov) (“The American people want Congress to be working on the creation of jobs and ensuring the continued progress of our economic recovery rather than involving itself unnecessarily in such costly and divisive litigation.” (quoting Rep. Nancy Pelosi explaining her opposition to the House's continued defense of the statute)).

<sup>55</sup> Marcia Coyle, *Boehner Says House Will Intervene to Support Defense of Marriage Act*, BLT: BLOG OF LEGALTIMES (Mar. 4, 2011, 4:09 PM), <http://legaltimes.typepad.com/blt/2011/03/boehner-says-house-will-intervene-to-support-defense-of-marriage-act.html> (quoting Rep. John Boehner).

<sup>56</sup> See, e.g., Amanda Terkel, *DOMA Defense: Lawmakers Puzzled Where House GOP Is Getting the Money to Pay Paul Clement*, HUFFINGTON POST (May 13, 2011, 5:54 PM), [http://www.huffingtonpost.com/2011/05/13/doma-defense-gop-paul-clement\\_n\\_861548.html](http://www.huffingtonpost.com/2011/05/13/doma-defense-gop-paul-clement_n_861548.html). Clement's defense of the law became the subject of considerable controversy after his law firm, King & Spalding, decided to withdraw from the litigation, and Clement in turn resigned from the firm. See, e.g., Ashby Jones, *After King & Spalding Drops DOMA Case, Clement Drops Firm*, WALL ST. J.L. BLOG (Apr. 25, 2011, 12:09 PM), <http://blogs.wsj.com/law/2011/04/25/after-king-spalding-drops-doma-case-clement-drops-firm/>.

could decide not to appeal an adverse trial court decision because there would, at that point, be a judicial determination that the law is unconstitutional. In the context of discussing the litigation surrounding “Don’t Ask, Don’t Tell,” Olson maintained that “[i]t would be appropriate for [the Government] to say ‘the law has been deemed unconstitutional, we are not going to seek further review of that.’”<sup>57</sup> Others have suggested that the government can choose not to appeal where doing so is in the United States’ long-term interests, either because success in the case is unlikely<sup>58</sup> or because appealing in that particular case might affect the government’s “relationship with the Court.”<sup>59</sup>

In the context of deciding whether to petition for certiorari before the Supreme Court, the government may also decide that “limiting the cases in which review is sought” may make it “more likely to obtain plenary review in those cases where it is most important.”<sup>60</sup> For this reason, then-Assistant Attorney General Rex Lee has distinguished between the duty to defend and the duty to appeal, explaining that situations where the DOJ does not defend a federal statute “should not be confused with situations in which the Department defends the constitutionality of a statute unsuccessfully in lower courts but does not seek an appeal.”<sup>61</sup>

3. *Intervention.*—The first two contexts in which the duty to defend arises both involve situations in which the government itself is a named defendant. But there are cases in which the constitutionality of a statute is at issue and the government is nonetheless not a named party. In such cases,

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<sup>57</sup> Dwyer, *supra* note 8 (quoting Ted Olson).

<sup>58</sup> See Cordray & Cordray, *supra* note 42, at 1329–30 (“[T]he Solicitor General considers whether the facts of a particular case present the issues and the government’s position favorably, how the case will impact the long-term development of the law, whether the subject area will be of interest to the Court, and whether the government will win on the merits.”); cf. Letter from Andrew W. Stroud, Counsel for Governor Arnold Schwarzenegger, to the Honorable Ronald M. George, Chief Justice of the Cal. Supreme Court 2 (Sept. 8, 2010), available at <http://metroweekly.com/poliglot/2010/09/08/GovLetterBrief.pdf> (“Litigation involves strategic decisions. The filing of a notice of appeal is one such strategic decision.”).

<sup>59</sup> Rex E. Lee, *Lawying for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 598 (1986); see also *infra* Part III.C (discussing the Solicitor General’s special relationship with the Court).

<sup>60</sup> *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 94th Cong. 6 (1975–1976) [hereinafter *Buckley Hearings*] (statement of Rex E. Lee, Assistant Att’y Gen., Civil Div.); see also Cordray & Cordray, *supra* note 42, at 1330 (“The Solicitor General also must prioritize, bringing only the most important cases to the Court.”). It is admittedly a bit odd to suggest that the government might ever view a decision holding a federal law unconstitutional as insufficiently significant to merit the Supreme Court’s review. Indeed, the Supreme Court will generally grant certiorari in such circumstances. See, e.g., Lynn A. Baker, *Lochner’s Legacy for Modern Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U. L. REV. 727, 733 (2005) (“Because the Washington Supreme Court had held a federal statute unconstitutional, there was no question that the U.S. Supreme Court would grant certiorari in the case.”).

<sup>61</sup> *Buckley Hearings*, *supra* note 60, at 6.

the government must decide whether to intervene to defend the statute's constitutionality.

At the federal level, the need for government intervention to defend the constitutionality of statutes came to the fore during the New Deal when the Supreme Court frequently struck down New Deal legislation, even in cases between private parties in which the United States had no opportunity to present its views.<sup>62</sup> As a result, Congress enacted a statute which provided that:

[W]here[] the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.<sup>63</sup>

This statute has frequently provided the basis for government intervention. For example, when two men who were sued for assault under the Violence Against Women Act's private right of action provision argued that "Congress lacked constitutional authority to enact" that provision, the Government intervened in the district court to defend the statute.<sup>64</sup>

The question of intervention is in some respects very different from the two preceding questions. The government has not been called into court to answer for the supposed problems with the statute, and the government generally need not worry that the statute will go undefended if it does not offer a defense. That said, few private litigants will wield the resources of the federal government, and they may not be in the best position to provide the strongest arguments in support of the statute's constitutionality. Moreover, private litigants will be primarily concerned about winning the case; those interests may or may not coincide with defending fully the constitutionality of the statute.

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<sup>62</sup> See, e.g., Arthur S. Miller & Jeffrey H. Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51, 57 (1979) ("Particularly vexatious to the President and Congress was that many of these decisions resulted from private suits in which no one appeared on behalf of the government. Public policy was being made in those lawsuits, which at times concerned only trivial matters for the litigants but had portentous consequences for the nation." (footnote omitted)); see also H.R. REP. NO. 75-212, at 2 (1937) ("The people generally, who then become directly interested in and vitally affected by what otherwise would be a private lawsuit, are entitled to have their representative appear with the right to present whatever evidence and argument may be necessary fully to develop and adequately to present that issue to the court.").

<sup>63</sup> 28 U.S.C. § 2403(a) (2006) ("The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."). The same statute provides that the state attorney general should similarly be notified where the constitutionality of a state statute is called into question. See *id.* § 2403(b).

<sup>64</sup> Petition for a Writ of Certiorari at 12, *United States v. Morrison*, 529 U.S. 598 (2000) (No. 99-5); see also *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 956 (4th Cir. 1997) ("The United States intervened to defend the constitutionality of VAWA.").

### C. *Justifications for the Duty to Defend*

Although the idea that the Executive Branch has a duty to defend challenged statutes is well-established, where this duty comes from is not.<sup>65</sup> To the contrary, what little literature exists on the subject largely elides the question. But the question is important because if there is not an absolute duty to defend that exists in all contexts, then there is reason to question whether it always makes sense for the Executive Branch to act as agent for the whole in this context and, in particular, whether it makes sense for the Executive Branch to defend challenged statutes where it has questions about their constitutionality. The idea that there is a *duty* to defend seems to rest upon two distinct premises: (1) that the Executive Branch's responsibility to enforce the law also includes a responsibility to defend it and (2) that the United States should speak with one voice through the Executive Branch.<sup>66</sup>

1. *Enforcement ≠ Defense.*—This duty to defend challenged statutes has been given to the Executive—and, more significantly, been viewed as exclusively belonging to the Executive—because commentators have assumed that the defense of statutes is no different than their enforcement. For purposes of enforcing statutes, the Executive is essentially the “United States.” Responsibility for the faithful execution of the laws is textually committed to the President in the Constitution;<sup>67</sup> indeed, it is fundamental to the separation of powers that the Legislature does not participate in the execution of the law.<sup>68</sup> And the Executive Branch enjoys significant discretion in determining how and when the laws of the United States should be enforced. As the Supreme Court has recognized, “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute

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<sup>65</sup> Although “the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested . . . is reserved to officers of the Department of Justice,” § 516, this statutory provision does not seem to impose an absolute duty on the Department to defend challenged statutes in all circumstances.

<sup>66</sup> There may also be less legally grounded motivations for advancing the idea that there is a duty to defend. Neal Devins and Saikrishna Prakash argue that the concept of a duty to defend serves the self-interests of the DOJ and, to a lesser extent, the White House. *See* Devins & Prakash, *supra* note 20, at 510–11.

<sup>67</sup> *See* U.S. CONST. art. II, § 3.

<sup>68</sup> *See, e.g.,* *Bowsher v. Synar*, 478 U.S. 714, 726–27 (1986) (“To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws, *Chadha* makes clear, is constitutionally impermissible.”); Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 800 (1999) (“[T]he Constitution imposes upon the President the obligation to administer law . . . through the Vesting Clause . . . [and] the Take Care Clause.”).

discretion.”<sup>69</sup> There are, of course, modest limits to this authority,<sup>70</sup> but it is nonetheless the case that when the “United States” is enforcing its laws, it is, in practice, the Executive Branch that is doing the enforcing.

Because responsibility for executing the law is committed to the Executive Branch,<sup>71</sup> commentators have assumed that responsibility for defending the law is as well.<sup>72</sup> They have assumed, in other words, that the enforcement of statutes and the defense of statutes are both properly viewed as species of executing the law. One court of appeals, for example, has suggested that

[A statute] designat[ing] the Senate Legal Counsel, upon a separate resolution of the Senate alone, to appear as the defender of all statutes on behalf of the United States itself. . . might . . . trench on the prerogatives of the executive branch of the United States, which has the authority to execute the laws of this country.<sup>73</sup>

The Executive Branch itself has made this assumption. In an Attorney General opinion from 1980 that provides one of the most extended treatments of the Executive Branch’s duty to defend challenged statutes, Attorney General Benjamin Civiletti treats the concepts of defense of the law and execution of the law as virtually inseparable, referring repeatedly to the Attorney General’s “duty to defend and enforce” constitutionally objectionable legislation.<sup>74</sup>

Other commentators, too, have made the same assumption. Former Solicitor General Kenneth Starr explained that when the constitutionality of a statute was challenged, it “became our duty ‘in faithfully executing the

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<sup>69</sup> Heckler v. Chaney, 470 U.S. 821, 831 (1985); cf. *In Moving KSM Trial, DOJ Blames Congress*, BLT: BLOG OF LEGALTIMES (Apr. 4, 2011, 1:50 PM), <http://legaltimes.typepad.com/blt/2011/04/in-moving-ksm-trial-doj-blames-congress.html> (citing Attorney General Holder as saying that “decisions about where to prosecute belong in the executive branch of government”).

<sup>70</sup> See, e.g., *Heckler*, 470 U.S. at 833 n.4 (noting that an agency’s decision might be reviewable “where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities” (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc))).

<sup>71</sup> See, e.g., Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1280 (1996) (“One of the President’s most important functions is to execute the civil and criminal laws of the United States.”).

<sup>72</sup> See, e.g., Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1192–95 (2012) (discussing conflicting views regarding whether the Take Care Clause implies a duty to defend); Winkler, *supra* note 10 (“For decades, presidents, Democrats and Republicans alike, have taken the position that it’s the executive’s obligation to defend the constitutionality of all federal laws. The basis for this view is the Constitution’s command that the president ‘shall take Care that the Laws be faithfully executed.’”).

<sup>73</sup> *Newdow v. U.S. Congress*, 313 F.3d 495, 497–98 (9th Cir. 2002).

<sup>74</sup> *The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 43 Op. Att’y Gen. 275, 275–76 (1980) (adding that “the Attorney General could lawfully decline to enforce [a patently unconstitutional law]; and he could lawfully decline to defend it in court”).

law' to go forward and defend the constitutionality of the statute."<sup>75</sup> Edward Corwin has argued that "once a statute has been duly enacted, whether over [the President's] protest or with his approval, he must promote its enforcement by all the powers constitutionally at his disposal unless and until enforcement is prevented by regular judicial process."<sup>76</sup> Another commentator has explained that "[s]eparation of powers means, among other things, that Congress legislates and that the President faithfully executes the laws. 'Execution' means enforcement, but it also implies the responsibility to defend and to uphold the laws against attacks in court."<sup>77</sup> Finally, others have explained that the need for executive defense of challenged statutes derives from the fact that "only the Executive Branch can execute the statutes of the United States."<sup>78</sup>

But there is a difference between enforcing a law and defending it. Enforcing the law requires the Executive Branch to make determinations about how the law should be implemented and what it should look like in practice.<sup>79</sup> Defending the law, by contrast, does not focus on the operation

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<sup>75</sup> Kenneth W. Starr, Remarks, *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 480, 485 (1990).

<sup>76</sup> EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 66 (4th rev. ed. 1957); see also Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 396 (1987) ("Judicially challenging the constitutionality of a statute may not be tantamount to refusing to obey the statute, but it comes close.").

<sup>77</sup> Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 970 (1983); see also Gussis, *supra* note 23, at 601 ("The President's duty to 'take Care that the Laws be faithfully executed' not only requires enforcement, but also implies the President's responsibility to defend the laws against attacks in court." (footnote omitted)). Although a Ninth Circuit panel once suggested that the Executive Branch's failure to defend a challenged statute raised constitutional questions, see *Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 842 F.2d 1102, 1123 n.15 (9th Cir. 1988) ("A more established practice of the executive branch is to decline to defend a challenged statute in court, although this, too, raises a constitutional issue."), that portion of the opinion was subsequently withdrawn by the en banc court, see 893 F.2d 205, 206 (9th Cir. 1990) (en banc).

At the state level, too, people have located state executives' obligations to defend state statutes against constitutional challenge in parallel constitutional provisions providing that the state executive should take care that the laws be faithfully executed. Indeed, the proponents of Proposition 8 charged Governor Schwarzenegger with violating that obligation when he refused to defend Proposition 8 in court. See Verified Petition for Alternative Writ of Mandamus at 8, *Beckley v. Schwarzenegger*, No. 3:09-cv-2292 (Cal. Ct. App. Aug. 26, 2010), available at <http://www.scribd.com/doc/36762974/Beckley-v-Schwarzenegger-Writ-of-Mandamus-Petition> ("Governor Schwarzenegger has a duty to see that the laws are faithfully executed." (citing CAL. CONST. art. V, § 13)).

<sup>78</sup> Attorney General's Duty to Defend and Enforce, 43 Op. Att'y Gen. at 276 ("[I]f executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, their conduct in office could jeopardize the equilibrium established within our constitutional system."); 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, 208 (2004) (arguing that when Congress defends a statute, it "delegate[s] the power to execute the law to itself"); *id.* at 224 ("[T]he [Senate Legal Counsel's] defense of a statute 'is the very essence of "execution" of the law.'" (quoting *Bowsher v. Synar*, 478 U.S. 714, 733 (1986))).

<sup>79</sup> See, e.g., Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV.

of the law and generally will not affect its operation at all. Rather, in defending a statute, the Executive simply provides the court with its understanding of what the Constitution requires and its argument for why the law at issue is consistent with it. To be sure, there may be situations in which the defense of a law and its enforcement are (at least seemingly) intertwined, but there remains a meaningful difference between the two concepts. Indeed, one court of appeals has disaggregated the concepts of enforcement and defense, describing the President's authority to refuse to enforce a statute as "dubious at best," while describing his authority to refuse to defend a statute in court as "undisputed."<sup>80</sup> Although the Executive's authority to refuse to defend a statute is hardly undisputed,<sup>81</sup> what is important is the court's recognition of the distinction between the concepts of enforcement and defense.

Moreover, enforcing the law is exclusively reserved to the Executive Branch. Thus, when the Executive Branch declines to enforce a law, the President is in fact engaging in a sort of "negative Executive lawmaking,"<sup>82</sup> effectively repealing the statute without the participation of the Legislature.<sup>83</sup> To be sure, it is not literally a repeal of the law—the law remains on the books and could be enforced by a future president—but it still means that the law is essentially without effect for the duration of the period of nonenforcement. When the Executive Branch declines to defend a law, by contrast, the law remains in operation,<sup>84</sup> and someone else can

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253, 276 (2003) ("[T]he executive branch was responsible for implementing the law, meaning the executive branch had the duty to *enforce* the law."); Lawson & Moore, *supra* note 71, at 1284–85 (describing the executive power as the power to put laws into effect); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 315 (2009) ("[E]nforcing the laws is not a mechanical task. Many statutes are ambiguous and have not been definitively interpreted by the courts. Many other statutes delegate considerable authority to the executive branch to decide how the underlying purposes of the statutes should be effectuated.").

<sup>80</sup> *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 889 (3d Cir. 1986).

<sup>81</sup> *See, e.g., infra* note 162.

<sup>82</sup> *E.g., Eugene Gressman, Take Care, Mr. President*, 64 N.C. L. REV. 381, 382–83 (1986) ("Such refusal to execute, even though due to constitutional doubts about the statute, amounts to a partial repeal of the statute—a repeal that constitutionally can be effected only through the normal legislative processes."). To be sure, the law remains on the books and could be enforced by a subsequent President, but that does not change the fact that the law will go unenforced in the meantime. *See id.* at 382 ("[W]hen the President tries to do more than he is permitted by statute, he becomes a lawmaker, a status foreign to the constitutional division of power.").

<sup>83</sup> *See id.*

<sup>84</sup> Of course, there is a rich literature on whether and when the President may decline to *enforce* a statute that he believes is unconstitutional. *See, e.g.,* David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61 (2000); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000). That debate is beyond the scope of my Article, and I do not take a position on it other than to note that the nondefense of statutes is, in my view, far less troubling than their nonenforcement. *See Gressman, supra* note 82, at 384 ("[T]he Executive can refuse to defend the constitutionality of a statute when judicial review has been properly instituted. But this right is a far cry

explain to the court why the statute should be upheld.<sup>85</sup> It is then left to the courts to determine whether the law is, in fact, constitutional—just as they would have done had the Executive Branch continued to defend the statute. Moreover, in such a situation, these new defenders of the law are in no sense intruding on the Executive Branch’s authority to enforce the law because they are not determining how or when the law should be implemented.<sup>86</sup>

Thus, enforcement and defense are, in my view, distinct activities, and only the former is properly viewed as a species of the Executive Branch’s obligation to take care that the laws are faithfully executed. Under this view, this first justification for the notion that the Executive Branch has an absolute duty to defend challenged statutes is unpersuasive.

2. *United States v. United States*.—Another reason why the Executive Branch has been viewed as having a duty to defend challenged statutes (although one more implicit in the commentary) seems to rest upon the view that it is inappropriate for the United States to speak with more than one voice in court and that the Executive Branch should be the United States’ exclusive agent in this context. The Supreme Court, in fact, has described the proposition that “there is more than one ‘United States’ that may appear before this Court” as “somewhat startling.”<sup>87</sup> It has also noted that

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from saying that the Executive may express his constitutional displeasure with a duly enacted statute by ignoring or refusing to execute it in the first instance.”)

<sup>85</sup> Indeed, the Executive Branch is often not alone in explaining to the Court why statutes should be upheld even when it chooses to defend them; rather, amici often aid the Executive Branch in its defense of challenged statutes. To be sure, there is a meaningful difference between party status and amicus status, and amicus participation is less frequent in the trial court, but the existence of this amicus participation at any level nonetheless suggests reason to question whether there is anything inherently problematic with nonexecutive actors defending statutes in court. For discussions of alternatives to executive defense of statutes and an argument that such alternatives are permissible, see *infra* Part IV.

<sup>86</sup> To be sure, in the course of defending a statute, its proponents may offer their own interpretations of the statute’s meaning. Such interpretations offered in litigation, however, need not be viewed as binding on the government and almost certainly should not be viewed as binding if made by an entity other than the Executive Branch. *Cf. Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (“If the Director asked us to defer to his *new* statutory interpretation, this case might present a difficult question regarding whether and under what circumstances deference is due to an interpretation formulated during litigation.”); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (“[W]e have declined to give deference to an agency counsel’s interpretation of a statute where the agency itself has articulated no position on the question, on the ground that ‘Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.’” (quoting *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971))).

<sup>87</sup> *United States v. Providence Journal Co.*, 485 U.S. 693, 701 (1988); see also *United States v. An Easement & Right of Way*, 204 F. Supp. 837, 839 (E.D. Tenn. 1962) (“It appears to the Court that there could not be any issue between the TVA and the FHA, both being the United States, which this Court could litigate or adjudicate.”).

[One reason] for reserving litigation in this Court to the Attorney General and the Solicitor General, is the concern that the United States usually should speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people.<sup>88</sup>

Similarly, in denying the Senate standing in a case, the Ninth Circuit noted that “[a] public law, after enactment, is not the Senate’s any more than it is the law of any other citizen or group of citizens in the United States. It is a law of the United States of America,”<sup>89</sup> and the court bemoaned the possibility that “a challenger of a law [might] have to contend with fighting the United States itself, and separately defending himself against the Senate and the House of Representatives, each of which would be able to appear as a separate litigating party in the case.”<sup>90</sup>

This concern also manifests in court doctrine, perhaps most significantly in political question doctrine. Under political question doctrine, courts are supposed to refrain from deciding certain cases that are more appropriately resolved outside the courts.<sup>91</sup> Although there are many different situations that can trigger the application of political question doctrine,<sup>92</sup> one reason courts refrain from resolving political questions is to avoid “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”<sup>93</sup> In other words, there is an important intuition that governmental division should not be expressed in the courts.

Yet despite the significance of this discomfort, it remains largely unexplained. Neither case law nor commentators ever make clear *why* it is embarrassing for the government to speak with more than one voice when that multiplicity of voices simply reflects the complicated reality of a multidimensional United States and a multiplicity of views regarding the constitutionality of a statute.<sup>94</sup> To be sure, there are contexts in which it is

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<sup>88</sup> *Providence Journal Co.*, 485 U.S. at 706; *accord* *Days*, *supra* note 27, at 502 (“[B]y making it unnecessary for Congress to become involved in litigation except in unusual cases, the Solicitor General’s policy of defending the acts of Congress ensures that the government speaks with one voice in the Supreme Court while at the same time reinforcing the Executive Branch’s status as the litigating arm of the government.”).

<sup>89</sup> *Newdow v. U.S. Congress*, 313 F.3d 495, 499 (9th Cir. 2002).

<sup>90</sup> *Id.* at 500.

<sup>91</sup> *See, e.g.*, Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) (“Underlying the political question doctrine and this constitutional design is the recognition that the political branches possess institutional characteristics that make them superior to the judiciary in deciding certain constitutional questions.”).

<sup>92</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing the factors that create a nonjusticiable political question).

<sup>93</sup> *Id.*

<sup>94</sup> *See* Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 907 (1991) (“The Court’s image of a unified federal government . . . is

important for the United States to speak with one voice or to act in a unified manner. For example, in explaining why the Framers “commit[ted] sole power to lay imposts and duties on imports in the Federal Government,” the Court identified the need for “the Federal Government [to] speak with one voice when regulating commercial relations with foreign governments.”<sup>95</sup> Related, the Court has noted that a “concern for uniformity in this country’s dealings with foreign nations’ . . . animated the Constitution’s allocation of the foreign relations power to the National Government.”<sup>96</sup>

But just because speaking with one voice makes sense in some contexts does not mean that it makes sense in all contexts.<sup>97</sup> Where the United States is not speaking to an external actor, but instead determining internally the validity of its laws and how those laws should be interpreted, there does not seem to be the same importance to speaking with one voice. If the courts are supposed to be the final arbiters of such questions,<sup>98</sup> or even play a meaningful role in answering such questions, it is unclear why we should have the Executive Branch determine outside of that forum which of the possible views of the United States will be the one represented. It seems far preferable to allow a multiplicity of voices into the courts and to let the courts use that multiplicity of views to reach the best outcome.

Indeed, the notion that the government currently only speaks with one voice is simply not true. As Neal Devins and Michael Herz have discussed at length, “[t]o a greater degree than is often realized or acknowledged, . . . Congress has placed responsibility for government lawyering with attorneys outside DOJ,”<sup>99</sup> and these other attorneys often have views that are distinct

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unrealistic.”); *id.* at 900 (describing the contention that “the United States is ‘one person’” as “uselessly conclusory”).

<sup>95</sup> *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976); *accord Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) (noting that Supreme Court cases have “stress[ed] the need for uniformity in treating with other nations”).

<sup>96</sup> *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)); *see also* THE FEDERALIST NO. 44, at 277 (James Madison) (Clinton Rossiter ed., 2003) (noting the “advantage of uniformity in all points which relate to foreign powers”). *But see* Sarah H. Cleveland, Crosby and the “One-Voice” Myth in U.S. Foreign Relations, 46 VILL. L. REV. 975, 975 (2001) (“The ‘one-voice’ doctrine is a myth. It finds little support in the constitutional framework, which divides the foreign relations powers among the three federal branches, and even less in the actual practice of the government.”).

<sup>97</sup> Even in those cases where it is important that the “United States” speak with one voice, there is still value in recognizing that the United States is composed of many competing parts which may have competing interests. Recognizing that fact will help ensure that meaningful consideration is given to sorting out those competing interests and determining which voice—and which message—should be the United States’ singular message.

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

<sup>99</sup> Devins & Herz, *supra* note 29, at 558–59; *cf.* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 470–72 (1989) (discussing a congressional debate over whether the Attorney General should represent the EPA in court).

from those of the Solicitor General.<sup>100</sup> As Devins has noted, “[T]he volume of public disputes between the Solicitor General and independent agencies is far from insignificant. Substantive conflicts arise every year in cases argued before the Court.”<sup>101</sup> Thus, there are often conflicts between different components of the Executive Branch that raise challenging questions about the justiciability of such disputes<sup>102</sup> and who should control the government’s litigation.<sup>103</sup>

These disputes manifest in many different ways. Sometimes they are subtle, hidden in the background of the case. In *United States v. Mitchell*, for example, the Court considered “whether the Indian General Allotment Act of 1887 authorizes the award of money damages against the United States for alleged mismanagement of forests located on lands allotted to [Native Americans] under [the] Act.”<sup>104</sup> The Court, in agreement with the Solicitor General representing the “United States,” concluded that it did not,<sup>105</sup> but as Justice White noted in his dissent, “[T]he Department of the Interior . . . disagree[d] with the position taken by the Solicitor General in this litigation and believe[d] that a money damages remedy should be permitted.”<sup>106</sup>

At other times, the intrabranched disputes are more evident because the DOJ “alerts a court to conflicting agency positions, or an agency that is not a party participates as an amicus, taking a position in conflict with another

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<sup>100</sup> See, e.g., Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 262 (1994) (“The government does not always speak as a single voice before the Supreme Court. Cabinet-level departments and executive agencies sometimes air their disputes with each other, Congress, and independent agencies before the Supreme Court.”); Fraley, *supra* note 19, at 1256 (“Solicitor General control of independent agency litigation would insure that the government addressed the Court with a single and coherent voice. This, of course, is not the current arrangement as a number of administrative entities possess varying degrees of litigating authority.”); see also *United States v. Providence Journal Co.*, 485 U.S. 693, 702 (1988) (“[D]isagreement [about a case’s worthiness for certiorari] actually arises on a regular basis between the Solicitor General and attorneys representing various agencies of the United States.”).

<sup>101</sup> Devins, *supra* note 100, at 258–59 (“It is atypical but not unusual to see a Solicitor General brief that the affected agency refuses to join or an agency brief at odds with the ‘Brief for the United States.’”); cf. Days, *supra* note 27, at 487 (“[The Solicitor General’s] responsibility is ultimately not to any particular agency or person in the federal government but rather to ‘the interests of the United States’ which may, on occasion, conflict with the short-term programmatic goals of an affected governmental entity.”).

<sup>102</sup> See, e.g., Herz, *supra* note 94, at 898 (“This Article attempts to define which intragovernmental disputes are justiciable.”).

<sup>103</sup> See, e.g., Devins & Herz, *supra* note 29, at 559 (“[W]e cast a fresh eye on the standard arguments for DOJ control of litigation.”); Devins & Herz, *supra* note 31, at 205 (“Who should speak the government’s voice in court?”).

<sup>104</sup> 445 U.S. 535, 536 (1980).

<sup>105</sup> See *id.* at 546.

<sup>106</sup> *Id.* at 550 (White, J., dissenting).

agency that is a party.”<sup>107</sup> Sometimes, albeit rarely, the Justice Department has filed multiple briefs taking different views. For example, in the landmark campaign finance case *Buckley v. Valeo*,<sup>108</sup> the Executive Branch was divided on the legislation’s constitutionality, so “the Senior Deputy Solicitor General in the office . . . became the Acting Solicitor General to defend the constitutionality of the Federal Election Campaign Act,” while “Attorney General Edward Levi and Solicitor General Robert Bork filed another brief by the government . . . express[ing] skepticism as to the constitutionality of the statute.”<sup>109</sup> Thus, the Department spoke with more than one voice, and the world did not end. To the contrary, the world may have been better off because the Court had more assistance in reaching its decision on an important constitutional question.

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Thus, in the end, neither of the two primary justifications for a duty to defend—that it is implicit in the Executive Branch’s responsibility for enforcing the law or that it is improper for the United States to speak with more than one voice in court—is sufficient to establish the existence of a *duty* that exists in all circumstances. This does not mean that the Department never has a responsibility to defend challenged statutes; it could have a prudential obligation to defend challenged statutes even in the absence of a legal duty to do so. But it does mean that there is no absolute duty that requires the Executive Branch to defend all statutes, even ones that the President has concluded are unconstitutional. I next consider the other criticism leveled against the Obama Administration—that the Executive Branch nonetheless should defend challenged statutes because its role (at least in this context) is properly that of Congress’s agent.

## II. THE PRINCIPAL–AGENT PROBLEM

As I noted at the outset, implicit (and sometimes explicit) in the criticisms of the Obama Administration’s DOMA decision was a notion that the Executive Branch should defend the law because it is Congress’s agent, and defending the law was the only way it could faithfully fill that

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<sup>107</sup> Herz, *supra* note 94, at 934–35 (footnote omitted). *District of Columbia v. Heller*, 554 U.S. 570 (2008), the case testing the constitutionality of the District of Columbia’s handgun ban, is another case in which the Executive Branch was arguably on both sides of the issue. There, the Vice President signed onto a congressional brief that did not take the same position as the brief of the Solicitor General’s office. Compare Brief for Amici Curiae 55 Members of U.S. Senate et al. Supporting Respondent, *Heller*, 554 U.S. 570 (No. 07-290), 2008 U.S. S. Ct. Briefs LEXIS 157 (brief signed by the Vice President), with Brief for United States as Amicus Curiae Supporting Petitioners, *Heller*, 554 U.S. 570 (No. 07-290), 2008 U.S. S. Ct. Briefs LEXIS 45 (Solicitor General’s brief).

<sup>108</sup> 424 U.S. 1 (1976).

<sup>109</sup> Starr, *supra* note 75, at 485.

role. This notion that the Executive Branch is a simple agent—or at least that it can be useful to think of the Executive Branch in that way—is not unique to the duty-to-defend context. But there are important limitations to the utility of applying classic principal–agent principles to executive branch action. In this Part, I begin by briefly discussing classic principal–agent principles, and I then explore their limitations in the context of executive branch action. Finally, I consider what those limitations can teach us about the Executive Branch’s responsibility for defending challenged statutes.

#### A. *The Classic Principal–Agent Problem*

At common law, a principal–agent relationship is one “in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person.”<sup>110</sup> Critical to this relationship is the principal’s “right to control the actions of the agent.”<sup>111</sup> The classic principal–agent problem arises because the principal cannot be sure that the agent will act in its best interests,<sup>112</sup> either because the agent may intentionally try to subvert the principal’s best interests or because it simply lacks the incentives to vigorously fulfill the principal’s wishes.<sup>113</sup> There are various tools that a principal can use to try to address this problem, both *ex ante* and *ex post*. For example, the principal can provide the agent with very specific directions, or it can try “to create a structure that induces the agent to perform in the principal’s interest without extensive monitoring.”<sup>114</sup> The principal can also set up penalties that will be imposed if the agent fails to fulfill its obligations.

Some accounts of the Executive Branch as agent view Congress as the principal<sup>115</sup> and draw upon classic principal–agent principles when

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<sup>110</sup> RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006).

<sup>111</sup> *Id.* (“A principal’s right to control the agent is a constant across relationships of agency, but the content or specific meaning of the right varies. . . . A principal’s failure to exercise the right of control does not eliminate it, nor is it eliminated by physical distance between the agent and principal.”).

<sup>112</sup> See, e.g., Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 376–77 (“The principal-agent problem arises because the principal has difficulty evaluating the agent’s effort or the conditions under which the agent operates. Thus, the principal cannot easily determine whether the agent has done well for the principal or for the agent.”).

<sup>113</sup> See, e.g., Jerry Brito & Drew Perraut, *Transparency and Performance in Government*, 11 N.C. J.L. & TECH. 161, 162 (2010).

<sup>114</sup> Schwab, *supra* note 112, at 377; see also Thomas A. Simpson, Commentary, *A Comment on an Inherently Flawed Concept: Why the Restatement (Third) of Agency Should Not Include the Doctrine of Inherent Agency Power*, 57 ALA. L. REV. 1163, 1166 (2006) (identifying different ways in which the principal can “structure the relationship to minimize the agent’s incentives to deviate”).

<sup>115</sup> See, e.g., Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 690 (1998) (“[Chief Justice] Marshall characterized the executive as the agent or ‘organ’ of Congress.”); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1742 (2002) (“Distrust of executive agents frequently causes Congress to attempt to control the smallest details of executive action . . . .”); Sidney A. Shapiro & Rena

discussing congressional efforts to ensure that the Executive Branch is acting in a manner faithful to Congress's commands.<sup>116</sup> Jacob Gersen, for example, has noted that the academic literature "is replete with suggestions about how and to what extent Congress can effectively control the bureaucracy, including the use of ex ante procedures, ex post monitoring, temporal limitations, budgetary appropriations, and other forms of political influence."<sup>117</sup> Congressional investigations into agency action are one ex post mechanism that is often the subject of considerable controversy.<sup>118</sup> Other scholars have discussed the extent to which Congress tries to delegate to agents that will be faithful to its wishes. As Daryl Levinson and Richard Pildes have explained, "[W]hen government is divided, congressional delegations move away from the Executive Office of the President and executive agencies and toward independent agencies and commissions,"

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I. Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 LAW & CONTEMP. PROBS. 99, 104 (2006) ("[A]lthough, through statutes, Congress directs the executive branch, the executive branch is still the agent of the people."); cf. Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 6 (1982) ("This model postulates that an increase in delegated legislative authority will increase 'agency costs,' (costs engendered by a divergence of the agent's goals and those of the principal) but will also diminish the principals' (legislators') decisionmaking costs . . ."); William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 494 (1995) ("One reason for Congress to establish multiple, competing 'agents' is to ensure that its policy wishes are executed faithfully."); Rodriguez, *supra* note 19, at 1198 (discussing one view of the President's role under which, "consistent with his constitutional responsibility to see that the laws are 'faithfully executed,' [he] is to manage the regulatory system in order to ensure that it is an optimal engine for the proper implementation of congressional policies" (footnote omitted)).

<sup>116</sup> See, e.g., Posner & Vermeule, *supra* note 115, at 1742.

<sup>117</sup> Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 211–12 (footnotes omitted); see *id.* at 212 ("This literature focuses on the use of ex ante and ex post mechanisms for generating or calibrating the incentives of agents to encourage them to act consistently with the interests of principals."). Matthew McCubbins, Roger Noll, and Barry Weingast have also discussed how an agency's structure and processes can be used to ensure it is faithful to its principal, but they acknowledge that the principal is not just Congress but also the "legislative coalition (including the President) that succeeded in passing the agency's enabling legislation." McCubbins et al., *supra* note 99, at 432.

<sup>118</sup> See generally William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781 (examining Congress's power to investigate the President and arguing for process reforms). For discussion of a recent controversy over the use of the congressional subpoena authority to investigate an independent agency, see Dave Jamieson, *House Dems Accuse Issa of Shilling for 'Corporate Interests' with NLRB Subpoena*, HUFFINGTON POST (last updated Oct. 12, 2011, 6:12 AM), [http://www.huffingtonpost.com/2011/08/12/issa-nlr-b-boeing-subpoena-house-dems\\_n\\_925561.html](http://www.huffingtonpost.com/2011/08/12/issa-nlr-b-boeing-subpoena-house-dems_n_925561.html). Of course, as some commentators have noted, "[C]onflicts-of-interest among the members of [the enacting] coalition may prevent them from effectively employing standard ex post corrective devices . . ." Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 502 (1989).

that is, “the executive branch actors most insulated from presidential control, and perhaps also most susceptible to congressional control.”<sup>119</sup>

Although such models of executive branch action are useful, there are, of course, important limitations to their utility, particularly when thinking normatively about the relationship between the branches and the appropriate parameters of executive branch action. In the context of executive branch action, after all, there will generally be multiple principals, and the principals that enacted a law will generally be without power to direct its execution in the future.<sup>120</sup> Moreover, although it is not uncommon for an agent to have interests that diverge from those of the principal, the Executive Branch is in some sense unique because it is *supposed* to have interests distinct from those of the principal.<sup>121</sup>

These limitations have important implications for how we think about executive branch action in many different contexts, as I discuss briefly at the conclusion of the Article. In the meantime, however, I focus on what these limitations are and what they can teach us about the Executive Branch’s role in defending challenged statutes.

### B. Executive Branch Action and the Principal–Agent Problem

Simple assumptions often belie more complicated realities. The assumption that the Executive Branch can act as simple agent for the whole ignores a much more complicated reality. When the Executive Branch acts as agent for the whole, the principal is both multiple and changing, complicating efforts to direct the Executive Branch’s actions. And the Executive Branch is itself both agent and principal, complicating any assumption that it can (or should) always act faithfully for the whole.<sup>122</sup>

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<sup>119</sup> Levinson & Pildes, *supra* note 16, at 2358 (“[W]hen Congress does choose to delegate, it will choose the agent most likely to share its policy preferences.”).

<sup>120</sup> Cf. John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 94 (2004) (“Principal-agent problems are particularly likely in situations where there are multiple principals . . .”).

<sup>121</sup> See, e.g., Levinson & Pildes, *supra* note 16, at 2360 (“Congress can attempt to use the usual tools of oversight and influence to bring the relevant agency back into line, but at least when it comes to executive branch agencies, there is good reason to expect that the President’s policy preferences will more often prevail.”); *infra* notes 137–43 and accompanying text. As noted earlier, these are problems that often manifest in the context of corporate organizations. See, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 259 (1999) (“A related point is that the principal-agent model assumes that it is clear who the principal is, and who the agent is in the particular relationship or transaction under study. Yet many of the most important relationships inside corporations may be more ambiguous, in the sense that both parties may be contributing productive inputs and neither may have authority over the other.”).

<sup>122</sup> See Peter Lindseth, *Agents Without Principals?: Delegation in an Age of Diffuse and Fragmented Governance* 2-3 (Univ. Conn. Sch. Law Articles & Working Papers, Paper No. 18, 2004), available at [http://lsr.nellco.org/uconn\\_wps/18/](http://lsr.nellco.org/uconn_wps/18/) (discussing the “autonomy” enjoyed by the agent when a “legislative ‘principal’” delegates power “to a subordinate ‘agent’”).

1. *Who Is the Principal?*—As noted above, in the paradigmatic principal–agent relationship, complications can arise because the agent is not faithful to the principal’s wishes. But there is, at least, a clear principal. It is the principal’s right and responsibility to determine the appropriate course of action, and the agent (in theory) will follow the principal’s direction.

In the context of executive branch action, by contrast, the principal’s identity is (arguably) unclear, and its ability to control the agent’s action is (at best) incomplete. Under one view, as I noted above, Congress is the principal and sets out directions in its legislative commands, which the Executive Branch, as agent, is supposed to put into action.<sup>123</sup> Under another view, the American people are the principal, and Congress and the President alike are their agents.<sup>124</sup>

In some sense, of course, the American people do provide broad policy directions through the people they elect to higher office.<sup>125</sup> But it is the people they elect who actually establish—through legislation, treaties, and the like—our nation’s substantive laws and policies. In that sense, it is our elected officials who are the principals. And the relevant elected officials are not just members of Congress. After all, Congress rarely acts alone in establishing the United States’ substantive laws and policies. For example, when there is a legislative command, that command most often reflects the will of both the President and Congress. Pursuant to the presentment process, the President signs almost all legislation.<sup>126</sup> Indeed, many laws originate as components of the President’s legislative agenda, and the White House may have played a significant role in their drafting and subsequent passage.<sup>127</sup>

Moreover, the principal is not necessarily the President and Congress in office when the particular law or policy at issue is being executed. Rather, the principal is the *enacting* legislative coalition, which will very often *not* be the legislative coalition in existence at the time of execution.

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<sup>123</sup> *But see* Shapiro & Steinzor, *supra* note 115, at 104 (suggesting that the American people are the principals because “when legislation is enacted, it can be regarded as an expression of the people regarding the nature and scope of the collective action they seek”).

<sup>124</sup> *See, e.g.*, Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 639 (1996) (“[T]he federal Constitution as a unified whole embodies the ultimate exercise of popular sovereignty—the creation of an agent/government by a principal/people.”); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1032 (2004) (“Because both the President and the Congress are agents of the people’s will, popular control of constitutional meaning demands that Congress and the President must be free to make and act on their own interpretations of the Constitution.”).

<sup>125</sup> *See, e.g.*, Horn & Shepsle, *supra* note 118, at 499.

<sup>126</sup> *See* U.S. CONST. art. I, § 7 (describing the presentment process).

<sup>127</sup> *See generally* James P. Pfiffner, *The President’s Legislative Agenda*, 499 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 23 (1988) (noting that “it is a commonplace in the last decades of the twentieth century that the president is our chief legislator” and discussing the history of presidential involvement in the legislative process).

As Daniel Rodriguez has explained, “[A]dministrators are responsible for obeying the mandates of the program as constructed by the enacting legislature,” but “[a]gencies carry out their functions in the shadow of the *current* legislature, an institution made up of members with individual goals and agendas.”<sup>128</sup> Thus, as Horn and Shepsle note, “[T]he enacting coalition . . . must worry not only about the potential for bureaucratic drift . . . , but also about the influence of subsequent political coalitions on the development and administration of the law.”<sup>129</sup>

This intertemporal complication will often be salient in assessing whether the principal can effectively control the actions of the agent. After all, when the President signs a bill into law, that law generally remains on the books until and unless it is subsequently repealed,<sup>130</sup> remaining valid even after the President and Congress that enacted it have left office.<sup>131</sup> Often, the current President and Congress will not support a law that their predecessors did,<sup>132</sup> which means that even if Congress were institutionally capable of exercising control over the Executive Branch’s actions,<sup>133</sup> the

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<sup>128</sup> Rodriguez, *supra* note 19, at 1192; *id.* at 1187–88 (noting that “regulatory policy . . . is made in the shadow of two legislatures,” the legislature that “enacted the statute” and “the one that exists contemporaneously with the program under evaluation,” and “there may be substantial differences in the extent of the legislature’s current commitment to the program as constituted and as functioning,” even if the legislature is “made up of many of the same members of the original coalition that created the program”); see also Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 71 (2006) (“[O]nce post-hoc supervision comes into play, the difficulties may be magnified, with a new coalition or group within Congress acting in accordance with aims that may be different from those of the coalition that originally enacted the law being administered.”).

<sup>129</sup> Horn & Shepsle, *supra* note 118, at 499.

<sup>130</sup> The only exceptions are laws that contain sunset provisions that include the date of their own expiration. See generally Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007).

<sup>131</sup> Cf. William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 173 (2000) (“[T]he concept of a single Congress producing legislation is undoubtedly a fiction. As reflected in the numbering of a new Congress every two years, different members, coalitions, parties, moods, and leadership change the nature of each Congress.”). Notwithstanding the regular change in the composition of Congress, it is well-established that the preferences of the legislative coalition that enacted the law are supposed to govern its execution, even after that coalition has left office. See, e.g., Rodriguez, *supra* note 19, at 1188 (“[A]gencies’ and courts’ struggles to discern what the enacting legislature intended, by resort to the text and legislative history of the statute, give a special pride of place to the preferences of the legislative coalition that enacted the statute.”).

<sup>132</sup> Various referred to as “retentionist bias” and “legislative inertia,” existing law can become entrenched for reasons that have nothing to do with the merits of the law or the levels of support it currently enjoys. See, e.g., Donald R. Livingston & Samuel A. Marcossion, *The Court at the Crossroads: Runyon, Section 1981 and the Meaning of Precedent*, 37 EMORY L.J. 949, 971 n.87 (1988) (“[A] number of systemic factors (the congressional committee system, the executive veto, the influence of special interest groups) . . . give the advantage to those who resist change.”); Rodriguez, *supra* note 19, at 1188 (“Legislation that has lost current legislative support may still persist where legislative institutions, such as ‘gatekeeper’ committees, restrictive amendment rules, and the presidential veto, stand in the way of change.”). See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 102, 123–24 (1982).

<sup>133</sup> This is a dubious proposition at best. Congress is itself composed of 535 different individuals with different interests and views and has only unwieldy tools for exercising control over any executive

Congress that is in office at the time the Executive Branch is acting—and therefore the Congress that must try to check any abuse of the Executive Branch’s delegated authority as it occurs—may not have the incentive to do so. Conversely, the actual principal—the *enacting* coalition—will have no power to control the Executive Branch’s actions. Thus, in the context of executive branch action, there will rarely be a principal capable of exercising sustained control over the agent’s actions in the same way as exists in the paradigmatic principal–agent context.

2. *Executive Branch as Principal and Agent.*—As noted above, in the paradigmatic principal–agent context, agents agree to act to fulfill their principal’s wishes. These agents may sometimes have to make discretionary decisions about *how* to fulfill the principal’s wishes,<sup>134</sup> but the goal remains the same.<sup>135</sup> It is unsurprising then that “[p]roblems may arise . . . if the agent and principal have diverging interests.”<sup>136</sup> Yet such problems are virtually inevitable when the Executive Branch is the putative agent because it will often have interests that diverge from those of the principal. The Executive Branch, after all, has never agreed to act only to fulfill the wishes of Congress (or even the people). To the contrary, it is *supposed* to have its own views on questions of both law and policy, and (at least sometimes) it is supposed to act on them.<sup>137</sup> In other words, the Executive Branch is, in some sense, both agent *and* principal.

As noted above, the Executive Branch’s role in setting the nation’s substantive law and policy generally begins during the legislative process

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branch agent. Cf. Rodriguez, *supra* note 19, at 1184 (“[Congress] is an unruly and far-flung lawmaking institution that has limited capacity to pursue systematic, focused regulatory change.”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1551 (1992) (describing the “factors [that] contribute to an institutional inertia that undercuts the effectiveness of direct legislative reaction as a regular means of checking agency policymaking”). This particular problem is, of course, not unique to the context of executive branch action. See, e.g., Blair & Stout, *supra* note 121, at 249 (“Because corporations are fictional entities that can only act through human agents, problems of agent fealty are frequently encountered by those who study and practice corporate law.”).

<sup>134</sup> See, e.g., Blair & Stout, *supra* note 121, at 259 (noting that typical principal–agent analysis does not “address situations in which part of the agent’s job is to figure out what needs to be done (a situation we suspect is the norm rather than the exception in most public corporations)”; Simpson, *supra* note 114, at 1165 (“Typically, the principal delegates some decisionmaking authority to the agent.”).

<sup>135</sup> See, e.g., RESTATEMENT (THIRD) OF AGENCY § 2.02 reporter’s note f (2006) (“The Comment explores common reasons for slippage between a principal’s intention in stating instructions to an agent and the agent’s subsequent conduct. The Comment does not presuppose that the agent’s act stems from the agent’s own interests or other improper purposes.”).

<sup>136</sup> Simpson, *supra* note 114, at 1166 (“[T]he agent may choose to gratify his own interests at the principal’s expense.”).

<sup>137</sup> This relationship between the Executive Branch and the Legislature is, of course, rooted in our adoption of a “presidential system, with its sharp divorce of executive from legislative.” Esmond Wright, *The Revolution and the Constitution: Models of What and for Whom?*, 428 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 6 (1976).

(through presentment and the President's role in setting the legislative agenda), and it continues through the law's execution. In part, such active involvement in the lawmaking process is inevitable: enforcement inherently necessitates some measure of discretion, requiring decisions to be made about how and when laws should be enforced. As the nation's law enforcer,<sup>138</sup> the Executive Branch is responsible for making those decisions, both domestically (for example, setting the nation's enforcement policies in areas ranging from immigration to drugs) and internationally (for example, deciding when to bring trade disputes alleging that a trade agreement has been violated). In part, this responsibility also results from the broad delegations of power often given to the Executive Branch through legislation.<sup>139</sup> In any event, whatever the cause, there can be no question that the Executive Branch—just like the Legislative Branch—is supposed to engage in substantive policymaking.<sup>140</sup>

Indeed, if the Executive Branch were intended simply to follow specific legislative commands with no exercise of discretion involved, there would be little reason for political appointees to head executive branch agencies. But the Executive Branch is, of course, full of such appointees intended to ensure that the Executive Branch's policymaking is reflective of the political and philosophical views of the President who heads it.<sup>141</sup> As has

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<sup>138</sup> See, e.g., Cheh, *supra* note 79, at 276 (“[T]he executive branch was responsible for implementing the law, meaning the executive branch had the duty to *enforce* the law.”). In fact, courts have held that Congress does not have “a direct ‘stake’ in the enforcement of [the law]. Once a law is passed and upheld as constitutional, Congress’s interest in its enforcement is no more than that of the average citizen.” *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 787 F.2d 875, 888 (3d Cir. 1986); accord *Am. Fed’n of Gov’t Emps. v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982) (noting that a Senator had standing where “[h]e claimed an interest which he, as a senator, had in the legislative process, different from any interest that he, like any other citizen, may have had in the execution of the bill once enacted”).

<sup>139</sup> See, e.g., *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 865 (1984) (noting that Congress may have legislated in general terms to give the executive branch agency the opportunity to balance “conflicting policies” because “those with great expertise and charged with responsibility for administering the provision would be in a better position to do so”); David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 948 (1999) (noting “the numerous cases in which the President and executive agencies are given real policymaking discretion in their own right, with either no statutory guidance or guidance that is so broad that it imposes almost no constraints on executive actions”).

<sup>140</sup> See, e.g., McCubbins et al., *supra* note 99, at 470 (“The Justice Department is itself a policymaking agency, and historically it has been especially closely tied to the President.”); cf. Epstein & O’Halloran, *supra* note 139, at 950 (“Congress is . . . wary . . . of ceding too much authority to executive branch actors who may pursue their own policy goals rather than those of the enacting legislative coalition.”).

<sup>141</sup> There is a rich literature, both descriptive and normative, that addresses the extent of presidential control over the administrative state. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); cf. Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 219 (1993) (noting “the increasingly systematic efforts of every President since Richard Nixon to gain control of the federal

been much discussed in the literature, there is often a resulting struggle between the Executive Branch and the Legislature for control over the administrative state.<sup>142</sup> As one commentator has noted, “The key decision makers at agencies are typically political appointees, in many cases serving solely at the pleasure of the President. Agency officials are thus much more likely to be faithful agents of the executive than of Congress.”<sup>143</sup>

The fact that the Executive Branch may have its own interests and views that do not fully represent or capture the interests of all of the parts that comprise the United States has often manifested in interbranch disputes in the courts.<sup>144</sup> Indeed, the Solicitor General is often viewed as representing “the executive branch of the United States government,” rather than the United States as a whole,<sup>145</sup> a fact which inevitably leads to conflicts of interest. As one commentator has noted, “[A]llowing the executive branch to represent its coequal partner [Congress] is like inviting the fox to guard the henhouse.”<sup>146</sup>

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bureaucracy”). Whatever one thinks about the question as a normative matter, there can be little debate that presidential control over the administrative state is significant, if not complete. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001).

<sup>142</sup> *See, e.g.*, LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 106 (4th ed. 1998) (discussing “control of the bureaucracy” as a “deep-rooted” “source of executive-legislative friction”); *cf.* Aranson et al., *supra* note 115, at 6 (“[T]he removal of politics from administrative processes really occurs only in civics books.”); McCubbins et al., *supra* note 99, at 435 (“[T]he President’s role in appointing the top administrators of agencies offers him an advantage in influencing policy, especially for agencies in the executive branch where the top administrators serve at the pleasure of the President.”).

<sup>143</sup> William P. Ferranti, *Interest Group Theory and Untrustworthy Outcomes: A Case Study of the Knoxville Power Administration*, 35 MCGEORGE L. REV. 637, 646 (2004).

<sup>144</sup> *See infra* notes 147–58 and accompanying text; *see also* Herz, *supra* note 94, at 910 (“Courts regularly permit interbranch litigation.”). The idea that the Executive and the Congress are sometimes at odds is hardly a novel one in American law and is, in some sense, inherent in our nonparliamentary system of government. *Cf.* Charles H. Koch, Jr., *The Devolution of Implementing Policymaking in Network Governments*, 57 EMORY L.J. 167, 197 (2007) (“The separation of the executive and the legislative in a presidential system empowers the judiciary to act as arbiters between the two.”).

<sup>145</sup> *Rex E. Lee Conference on the Office of the Solicitor General of the United States: Pre-Reagan Panel*, 2003 BYU L. REV. 40 (statement of Judge Frank Easterbrook); *see id.* at 40–41 (“[T]he Solicitor General] is litigating on behalf of the executive branch. . . . [Where] [t]he executive branch of the United States government, acting through the people appointed for that purpose, had settled on a particular antitrust policy and civil rights policy, . . . his job was to defend it.” (statement of Judge Frank Easterbrook)); *see also* Rebecca Mae Salokar, *Representing Congress: Protecting Institutional and Individual Members’ Rights in Court*, in CONGRESS AND THE POLITICS OF EMERGING RIGHTS 105, 107 (Colton C. Campbell & John F. Stack, Jr. eds., 2002) (quoting a 1926 brief in which the petitioner noted that the Government was “question[ing] the constitutionality of its own act,” “the Solicitor General [was] appearing as a representative of the Executive Department of the Government,” and a Senator was “represent[ing] another branch”).

<sup>146</sup> Salokar, *supra* note 145, at 106; *accord* *United States v. Providence Journal Co.*, 485 U.S. 693, 714 (1988) (Stevens, J., dissenting) (“When faced with a difference of view between the Executive Branch and a coordinate branch of government, . . . the Solicitor General faces a conflict of interest that undeniably would be intolerable if encountered in the private sector.”); Miller & Bowman, *supra* note 62, at 67–68 (“[I]n interbranch litigation there is no such thing as ‘the United States.’ There is the

Consequently, Congress has frequently intervened in litigation to challenge the view that the Executive Branch was faithfully acting for the United States as a whole.<sup>147</sup> In such cases, it is often “the United States Senate or the Leadership of the United States House of Representatives” purporting to “defend[] the interests of Congress as an institution,”<sup>148</sup> “either because the Executive Branch was seen to be misinterpreting Congressional intent or otherwise not adequately enforcing the law”<sup>149</sup> or because the “Solicitor General, while representing the United States before the Supreme Court, [was viewed as] fail[ing] to properly defend a federal statute.”<sup>150</sup>

This desire to protect Congress’s own institutional interests was evident in *Morrison v. Olson*,<sup>151</sup> a case addressing the constitutionality of the independent counsel provision of the Ethics in Government Act.<sup>152</sup> The Act “allow[ed] for the appointment of an ‘independent counsel’ to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws,”<sup>153</sup> and it granted the counsel “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice” “with

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interest of the President, as in executive privilege, and the interest of the Congress in the enforcement of its laws.”).

<sup>147</sup> See JUDITHANNE SCOURFIELD MCLAUCHLAN, CONGRESSIONAL PARTICIPATION AS *AMICUS CURIAE* BEFORE THE U.S. SUPREME COURT 1 (2005) (“Members of Congress have come to play an increasingly significant role as lobbyists before the U.S. Supreme Court.”); see also R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote Is This, Anyway?*, 62 NOTRE DAME L. REV. 1, 1 (1986) (“In recent years Members of the United States Congress have brought suit against the executive branch of the federal government with growing frequency.”). According to McLauchlan, this is “[t]he most frequent type of case in which Members of Congress file *amicus* briefs.” MCLAUCHLAN, *supra*, at 81.

<sup>148</sup> MCLAUCHLAN, *supra* note 147, at 51; see also *id.* at 54 n.170 (“In 10% of the cases in which Members of Congress participate as *amici*, they do so under the auspices of the House or Senate Legal Counsel’s Offices, acting in the interests of the U.S. Senate or the U.S. House [of] Representatives.”). When the Senate or House files an institutional brief, that does not mean that *every* member of the body agrees. See, e.g., *INS v. Chadha*, 462 U.S. 919, 929 n.4 (1983).

<sup>149</sup> MCLAUCHLAN, *supra* note 147, at 51.

<sup>150</sup> *Id.* at 52; accord Salokar, *supra* note 145, at 116 (noting that Congress is most likely to be defending the constitutionality of a statute “where Congress must fill the shoes of the ‘United States’ because the Department of Justice has chosen not to, or where Congress suspects that the executive branch will not provide a hearty defense of the law”); see also Brief of the Speaker and Bipartisan Leadership Grp. of the House of Representatives as Amici Curiae Supporting Respondents, *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221 (1986) (Nos. 85-954, 85-955), 1986 U.S. S. Ct. Briefs LEXIS 347, at \*3 (The House filing an *amicus* brief to resist “novel theories of separation of powers . . . presented to [the] Court indirectly by the Executive and more openly by the Japanese petitioners”); Brief of the Speaker & Bipartisan Leadership Grp., *Bowsher v. Synar*, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, 85-1379), 1986 U.S. S. Ct. Briefs LEXIS 160, at \*21 (“The Senate and House parties intervened [in the district court] to defend the Act against the Executive’s challenge . . .”).

<sup>151</sup> 487 U.S. 654 (1988).

<sup>152</sup> 28 U.S.C. §§ 49, 591–598 (1982).

<sup>153</sup> *Morrison*, 487 U.S. at 660.

respect to all matters in such independent counsel's prosecutorial jurisdiction.<sup>154</sup> The Executive Branch viewed this as an inappropriate grant of executive power and decided that the interests of the "United States" lay not in defending the statute, but in arguing that it was unconstitutional.<sup>155</sup> The Congress unsurprisingly disagreed, and both houses filed amicus briefs defending the legislation's constitutionality.<sup>156</sup> In invoking the Supreme Court rule that allows the United States to file amicus briefs without the consent of the parties,<sup>157</sup> the House clearly sought to suggest that it (and not the Executive) was now acting for the United States.<sup>158</sup> Whichever branch could more rightly claim that it was acting on behalf of the whole, one thing is clear: simple assumptions of faithful agency on the part of the Executive Branch proved problematic.

### C. *The Duty to Defend and the Principal-Agent Problem*

As I noted at the outset, executive branch representatives act for the United States every day in many different contexts around the world. Recognizing the complications inherent in thinking of the Executive Branch as a simple agent may have important (and varying) implications across those different contexts—both in terms of determining the proper roles for the Executive Branch and the Legislature in effectuating our nation's substantive law and policy and in determining whether (and what) controls may sometimes be necessary to ensure that the Executive Branch's actions are consistent with the authority it has been delegated. But whatever lessons these complications may have to teach in other contexts, there are two clear lessons in the context of the Executive Branch's role in defending challenged statutes.

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<sup>154</sup> § 594(a).

<sup>155</sup> See Brief for the United States as Amicus Curiae Supporting Appellees, *Morrison*, 487 U.S. 654 (No. 87-1279), 1988 U.S. S. Ct. Briefs LEXIS 980, at \*9 ("The interest of the United States in this case is in preserving an important part of the power and duty of the President to 'take Care that the Laws be faithfully executed.'"). The Executive Branch took this position in both the lower courts and in the Supreme Court.

<sup>156</sup> See Brief for the United States Senate as Amicus Curiae Supporting Appellant, *Morrison*, 487 U.S. 654 (No. 87-1279), 1988 U.S. S. Ct. Briefs LEXIS 992; Brief of the Speaker & Leadership Grp. of the House of Representatives as Amici Curiae Supporting Appellant, *Morrison*, 487 U.S. 654 (No. 87-1279), 1988 U.S. S. Ct. Briefs LEXIS 995, at \*8 n.2. ("Participation by the Speaker and Leadership Group is the standard mechanism by which the House of Representatives pursues its institutional interests in litigation."). The House and Senate both filed amicus briefs defending the constitutionality of the legislation in the lower court as well. See *In re Sealed Case*, 838 F.2d 476, 477 (D.C. Cir. 1988).

<sup>157</sup> See SUP. CT. R. 37(4).

<sup>158</sup> See Brief of the Speaker and Leadership Group, *supra* note 156, at \*8 n.2 ("In light of the institutional nature of this participation and the status of the House of Representatives in the government of the United States, it would appear appropriate for the Speaker and elected leadership of the House of Representatives to avail themselves of the right to submit a brief as *amici curiae* without the consent of the parties, in accordance with the provisions of Sup. Ct. R. 36.4.").

First, the existence of intertemporal complications means that the principal that enacted a law at  $t_1$  will often have no authority to control the agent's actions in defending the law at  $t_2$ . In the case of DOMA, this disconnect is obvious. DOMA was passed in 1996 by the 104th Congress and signed into law by President Clinton.<sup>159</sup> Fifteen years later, there was a new Congress and a new President. It is utterly unsurprising that this new Congress and this new President have different views about DOMA and its constitutionality than did their predecessors.<sup>160</sup>

But the fact that a current President and Congress may not support a law is irrelevant to the question of whether it should be defended (at least so long as the current President and Congress are unwilling to repeal the law through legislative action). In our constitutional system, the President and Congress cannot undo the work of their predecessors through implicit action, and the courts—not the political branches—are the final arbiters of constitutional questions. Recognizing that the principal that enacted the law has no power to ensure that it is defended means that outside actors may sometimes need to take up the defense of challenged statutes in cases where neither the current President nor the current Congress is willing to do so.<sup>161</sup>

Second, the fact that the Executive Branch is at once both principal and agent makes it utterly unsurprising that the Executive Branch (specifically, the President and his political appointees at the DOJ) might have its own views about legal questions, including ones that do not directly implicate core areas of executive power. After all, regardless of whether one believes it is appropriate for the Executive Branch to act upon its own independent views of legal questions,<sup>162</sup> it is not surprising that it should have such

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<sup>159</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>160</sup> To be sure, some members of Congress who supported DOMA in 1996 might no longer support it in 2011. But whether that is the case or not, it is utterly unsurprising that the 112th Congress and President Obama may not want to defend this law.

<sup>161</sup> See *infra* notes 217–28 and accompanying text.

<sup>162</sup> There is a substantial debate in the literature on that question. See, e.g., Carpenter, *supra* note 15, at 406–07 (“Now a growing number of respected constitutional theorists, coming from a broad range of political and jurisprudential perspectives, have begun to question the legitimacy of judicial supremacy in constitutional interpretation.”); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 658 (2000) (“Even as judicial supremacy gains ascendancy in the courts, its star is on the decline in the legal academy.”); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1045 (2004) (“Judicial supremacy is under attack. From various points on the political spectrum, political actors as well as academics have challenged the idea that the courts in general, and the Supreme Court in particular, have a special and preeminent responsibility in interpreting and enforcing the Constitution.”). Compare, e.g., Lawson & Moore, *supra* note 71, at 1268 (“It is emphatically the province and duty of the President to say what the law is . . .”), and Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 222 (1994) (arguing that the President has the power “to interpret the law, including the Constitution, independently of the other branches’ interpretations”), with, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (“[W]e defend . . . [the] assertion of judicial primacy without qualification . . .”), Burt Neuborne, *The Binding Quality of Supreme Court Precedent*,

views.<sup>163</sup> And if it can (and should) have such views, it makes little sense to say that it cannot present those views to the courts.

After all, even if one is not prepared to accept the idea that the Supreme Court's claims of interpretive supremacy are merely "self-interested assertion[s]" inconsistent with "constitutional first principles,"<sup>164</sup> and thinks instead that the Executive Branch is obliged "to comply with the law as judicially declared,"<sup>165</sup> that does not mean the Executive Branch should suppress its views when the Court is deciding what the law is.<sup>166</sup> Indeed, it may actually facilitate judicial resolution of the issues for the Executive Branch to present the courts with its own best views of the legal question at issue.

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Thus, in the end, I do not think it is correct to cast the Executive Branch as Congress's agent in this context and to argue that it must always defend challenged statutes for that reason. But, again, the fact that the Executive Branch *need* not defend challenged statutes does not mean that it *should* not. After all, even in the absence of a legal obligation, it may make sense for the Executive Branch to generally assume responsibility for defending challenged statutes. But it does mean that there may be circumstances in which it does not make sense for the Executive Branch to do so. In the next Part, I consider the context in which the Obama Administration declined to defend DOMA, and I argue that the Executive Branch should not defend challenged statutes where it believes the statute is unconstitutional or even has questions about its constitutionality.

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61 TUL. L. REV. 991, 993 (1987) ("[S]o long as the judicial precedent remains viable, the executive's duty is to conform its conduct to the Supreme Court's precedent, not merely as a matter of respect, prudence, expedience, or *realpolitik*, but as a matter of formal legal obligation."), and Schauer, *supra*, at 1046 ("I seek to . . . show that the judicial role labeled 'judicial supremacy' is the natural partner of constitutionalism itself.")

<sup>163</sup> See, e.g., Owen Fiss, *Between Supremacy and Exclusivity*, 57 SYRACUSE L. REV. 187, 187 (2007) ("Throughout history, the Supreme Court has been depicted as the final arbiter of the meaning of the Constitution. Such a view does not deny the role that the other branches of government or, for that matter, the general citizenry have in interpreting the Constitution. It only posits a priority for the interpretations of the judicial branch. The governing assumption is that where there are conflicting interpretations, the Court's should prevail.")

<sup>164</sup> Paulsen, *supra* note 162, at 225.

<sup>165</sup> Neuborne, *supra* note 162, at 993.

<sup>166</sup> See *id.* at 1002 (arguing that even though the Attorney General "is bound by law to conform to established Supreme Court precedent," he is "free to seek to persuade the Supreme Court to change its mind by seeking reargument and presenting new cases for decision").

## III. DEFENDING EXECUTIVE NONDEFENSE

In his statement announcing that the DOJ would no longer defend DOMA, the Attorney General explained that “[t]he President has . . . concluded that Section 3 of DOMA, as applied to legally married same-sex couples, . . . is . . . unconstitutional,” and that “[g]iven that conclusion, the President has instructed the Department not to defend the statute in [such cases].”<sup>167</sup> The Attorney General also stated that he “concur[red] in [the President’s] determination.”<sup>168</sup> In this Part, I assume that the President or his political appointees in the DOJ have determined that the law at issue is unconstitutional or, at minimum, have genuine questions about its constitutionality. I do not consider the internal process by which the President or the Department have arrived at that conclusion or whether this is a determination in which the President should always be involved. Instead, I simply focus on the reasons why the Department should not act for the United States in such a context.

A. *The Adversary System*

A defining and distinctive feature of the American legal system is its commitment to an adversarial system of justice.<sup>169</sup> Although this commitment may be imperfectly realized, it manifests in numerous practices and procedures that define the American justice system. Standing doctrine, for example, is routinely justified as a means of “ensur[ing] the proper adversarial presentation” of issues, a presentation that will facilitate the courts’ ability to adjudicate cases and will improve the quality of the courts’ decisions in the end.<sup>170</sup>

Brian Goldman has explained that the adversarial system of justice serves four distinct functions: “accuracy, acceptability, neutrality, and the resolution of actual disputes.”<sup>171</sup> It furthers accuracy by ensuring that the court has before it all of the relevant facts and legal precedents, and it

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<sup>167</sup> Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives, *supra* note 8, at 5.

<sup>168</sup> *Id.*

<sup>169</sup> See, e.g., Frost, *supra* note 22, at 495 (“[T]he adversarial system itself is widely acknowledged to be a fundamental feature of the American adjudicatory process.”); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 371 (2001) (“The traditional premise of American civil adjudication is that ours is an adversary system: Litigation is a process by which an impartial arbiter resolves a dispute between private parties following an adversarial demonstration of privately developed facts and zealously presented legal arguments.”); see also Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 470 (2008) (noting that standing doctrine is rooted in the notion that the parties’ adverseness “promote[s] better litigation”).

<sup>170</sup> *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007); see also *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978) (invoking the courts’ interest in “assur[ing] that the most effective advocate of the rights at issue is present to champion them” in the context of prudential limitations on standing).

<sup>171</sup> Goldman, *supra* note 22, at 940.

promotes acceptability by “providing parties with procedural justice: control over their own cases and a fair opportunity to be heard.”<sup>172</sup> Neutrality follows from the fact that the parties maintain control over their own cases; because the parties are providing the court with the information it needs, the court does not become “too active a participant in the proceedings.”<sup>173</sup> Finally, by confining themselves to the resolution of actual disputes, the courts ensure that they do not transgress established limits on the judicial role.<sup>174</sup>

As a general matter, the Executive Branch’s participation in a case promotes the adversarial system of justice and the underlying goals the system is supposed to promote. After all, where the Executive Branch believes that the challenged law is constitutional, there will generally be no one better positioned to defend it. The Executive Branch’s lawyers have the skills and resources to zealously advocate in defense of the United States and its laws. They can provide the court with all of the information and law it will need to resolve the case, and they will often be particularly well positioned both to advise the court as to how the law works in practice and to determine which arguments will serve the nation’s short- and long-term interests.

But for the reasons discussed above, there will be cases in which the Executive Branch does not actually believe the law is constitutional (or at least has questions about its constitutionality) and cases in which the Executive Branch’s ability to zealously defend the statute may be compromised.<sup>175</sup> For example, where the Executive Branch believes a law is

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<sup>172</sup> *Id.* at 943.

<sup>173</sup> *Id.* at 947 (quoting Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 *BUFF. L. REV.* 487, 491 (1980)).

<sup>174</sup> *See, e.g., Duke Power Co.*, 438 U.S. at 103 (Stevens, J., concurring in the judgment) (“We are not statesmen; we are judges.”); *Liverpool, N.Y. & Phila. Steamship Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885) (“[The Court] has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, [one of which is] . . . never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 *CALIF. L. REV.* 1915, 1920 (1986) (“It is a judge’s obligation to decide private disputes. If, as part of that process, interpretation of the constitutionality of statutes is required, so be it. The trigger of judicial power, however, is the protection of private rights.”).

<sup>175</sup> *See Devins & Prakash, supra* note 20, at 572 (“[A] law’s proponents are more likely to vigorously defend the statute than is the Solicitor General, who, in the course of a tepid defense of a law, might admit its constitutional infirmities.”). One commentator has argued that “[t]he Constitution itself provides sufficient means for Congress to encourage the executive to defend vigorously all federal statutes: the appropriations power, the impeachment power, the investigatory and oversight power, and the legislative power.” Cobb, *supra* note 78, at 233 (footnotes omitted). In theory, perhaps this is right; but in practice, it seems unlikely that Congress can effectively monitor the Executive Branch’s litigation. Moreover, this view seems to ignore the complications presented by modern political realities. *See generally* Levinson & Pildes, *supra* note 16, at 2315 (“The practical distinction between party-divided

unconstitutional, it may be unwilling to make the strongest arguments that can be made in its defense. After all, the Executive can—and often does—have its own independent views of the Constitution,<sup>176</sup> and those independent views may affect what arguments it is willing to make in its briefs.<sup>177</sup> Indeed, the Executive Branch has long maintained that it will make only “reasonable” arguments in defense of a statute, and that not every “plausible” or “professionally responsible argument[.]” is a “reasonable” one.<sup>178</sup> As one long-time Senate staffer noted, this was a recurrent problem that contributed to the need for the Senate Legal Counsel: the DOJ “might not like the statute, and it might not defend it quite as vigorously as we would like, or it might use arguments that are not the same arguments we’d make.”<sup>179</sup> And regardless of whether this was a frequent problem in the past, the modern prospect of the circulation of briefs on the Internet may make it more likely that the executive branch will be reticent to publicly take legal positions with which it disagrees.<sup>180</sup>

In such cases, the Executive’s “defense” of a statute may actually undermine the interests of an adversarial system of justice more than it

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and party-unified government rivals in significance, and often dominates, the constitutional distinction between the branches in predicting and explaining interbranch political dynamics.”).

<sup>176</sup> See, e.g., Paulsen, *supra* note 162, at 221 (“[T]he executive’s power to interpret the law may, and should, be exercised *independently* of the interpretations of other branches, including those of the federal courts.”). Paulsen and others have gone even farther to argue that the Executive’s determinations regarding which laws are unconstitutional should guide its enforcement decisions. See, e.g., *id.* at 221–22 (“[The President] may decline to execute acts of Congress on constitutional grounds, even if it is those grounds have been rejected by the courts. In executing a statute he determines is constitutionally valid, he may use his own interpretation of the statute, even if it is contrary to the interpretation placed on it by the courts.”); see also William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 307 (2011) (“I share the increasingly conventional wisdom that the President must interpret the Constitution for himself, and must not enforce laws he believes violate it.”); Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616–17 (2008) (“[The President] violates his constitutional oath when he enforces a law he regards as unconstitutional.”).

<sup>177</sup> There are other institutional actors that may also have interests independent of their client. The ACLU and the Washington Legal Foundation, for example, are ideological actors, and they presumably will hesitate before making arguments that win the battle but lose the war. Thus, their views and interests are going to influence the nature of the arguments that they make in court, which can raise interesting ethical questions.

<sup>178</sup> Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives, *supra* note 8, at 5.

<sup>179</sup> Interview with Charles Ludlam, Senate Historical Office Oral History Project, The Senate Legal Counsel: Interview #1, at 22 (Dec. 2, 2003) [hereinafter Ludlam Interview], available at [http://www.senate.gov/artandhistory/history/resources/pdf/Ludlam\\_Interview1.pdf](http://www.senate.gov/artandhistory/history/resources/pdf/Ludlam_Interview1.pdf).

<sup>180</sup> For example, when the Obama Administration’s early briefs in the DOMA litigation contained arguments that were reasonably understood to be anti-gay, a firestorm of controversy erupted. Cf. Richard Brust, *Dead Precedents: The Justices Overrule, but They Often Do So Stealthily*, A.B.A. J., May 2011, at 22, 23 (quoting Professor Paul Horwitz as saying, “In a media-heavy age, the court is so aware of being watched that it’s especially loath to act with what might be seen as a heavy hand.”).

promotes them.<sup>181</sup> Where the Executive is unwilling to make all of the arguments that could be made in defense of a statute, the court will not receive a full presentation of the relevant issues and arguments, thus at least potentially undermining the accuracy of the system. And the court may have to engage in more independent research than it would otherwise find necessary, thereby undermining the system's interest in preserving a neutral decision maker.

The DOMA litigation provides an apt example of how the Executive Branch's views regarding the constitutionality of a statute can influence its ability to defend it. After all, the Obama Administration abandoned arguments in defense of DOMA that had been made by the Bush Administration. The Bush Administration, for example, had argued that "section 3 of DOMA [is] rationally related to the legitimate government interest in encouraging the development of relationships that are optimal for procreation"<sup>182</sup> and that "Congress may permissibly decide to encourage the creation of stable relationships that facilitate the rearing of children by both of their biological parents."<sup>183</sup>

One can strongly disagree with those arguments yet still recognize that they might be persuasive to certain judges.<sup>184</sup> Once the Obama Administration abandoned those arguments, it was forced to make arguments that were at best weak and at worst incoherent: for example, that the legitimate governmental interest underlying DOMA was its interest in maintaining the status quo, a curious argument, given that the status quo prior to the enactment of DOMA simply recognized as valid any marriage conducted in a state that recognized it as valid. Moreover, while one might think that arguments about procreation would do little to promote the accuracy of the courts' decisions regarding DOMA, one can easily imagine situations in which the Government's failure to present the court with all of the relevant facts and law could undermine the accuracy of the court's conclusion.<sup>185</sup>

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<sup>181</sup> See Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 120 (2000) ("The integrity of the judicial process may be undercut when parties put forward for duty's sake a position to which, in fact, they do not subscribe.").

<sup>182</sup> Memorandum in Support of Fed. Defendant's Motion to Dismiss at 15, *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (No. 8:04-cv-1680-T-30TBM), 2004 U.S. Dist. Ct. Motions LEXIS 31640, at \*27–28 ("Congress could seek to encourage the creation of stable relationships in which people can securely procreate.").

<sup>183</sup> *Id.* at 16.

<sup>184</sup> See, e.g., *Standhardt v. Superior Court*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003).

<sup>185</sup> One could imagine, for example, a Republican administration agreeing to defend the health care legislation, but only on the basis of the taxing and spending power, thus leaving out of the statute's defense critical empirical information that would buttress the statute's validity under the Commerce Clause. Whether the court in such cases should appoint additional counsel to present or develop a particular argument is a difficult question.

To be sure, amici may step in and make some of the arguments that the Executive Branch declines to make. But amici will generally be unable to develop the factual record before the trial court, which means that the court will either decide the case based on an incomplete factual record or based on facts that have not been subjected to the rigors of adversarial testing. Moreover, amici will generally receive less attention than the parties, especially when the party is the United States as represented by executive branch lawyers. Finally, amici will have fewer pages of briefing and generally no opportunity to present their views to the court through oral argument. Thus, where the Executive Branch fails to zealously defend a statute, the zealotness of amici will generally be insufficient to address the problem.

The Executive Branch's failure to zealously defend a statute can also undermine the general public's willingness to accept the court's decision. When Goldman wrote that the adversarial system improves the acceptability of decisions, he focused primarily on the parties' acceptance of a court's decision,<sup>186</sup> but the public's acceptance is also important, especially where the significance of the case will extend far beyond the immediate parties. If the public perceives that the Executive Branch did not mount a full defense of the statute, it may undermine the public's confidence in a decision striking it down. It is not difficult to imagine that this would have happened if the Obama Administration had continued its defense of DOMA, as commentators were already criticizing the Administration for mounting a "deliberately weak legal defense" of the statute.<sup>187</sup> Here, too, the advent of the Internet and the wider distribution of government briefs may contribute to a decline in the acceptance of court decisions where it is perceived that the government failed to mount a full defense of the statute.

There is thus reason to think that the Executive Branch's defense of a statute may undermine adversarialism more than it promotes it in cases where the Executive Branch has questions about the law's constitutionality. To be sure, private attorneys often take positions with which they disagree and argue for laws which they may think are unconstitutional. And there is no doubt that executive branch lawyers could do the same. But, as I argue in the remainder of this Part, the Executive Branch is different than private counsel. Although private counsel's primary interest is in victory for their clients,<sup>188</sup> the Executive Branch has its own institutional interests, and it

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<sup>186</sup> See Goldman, *supra* note 22, at 943–47.

<sup>187</sup> "Deliberately Weak Legal Defense," CAL. CATHOLIC DAILY (July 12, 2010), <http://calcatholic.web141.discountasp.net/news/newsArticle.aspx?id=14f12763-f31f-43be-89ea-9ea2de53948a>.

<sup>188</sup> All lawyers, of course, have some duty to the court, but their primary duty is to zealously advocate on behalf of their client. Cf. James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349, 350 (2000) ("[I]n our adversary system the lawyer's duty to the court is almost entirely harmonious with the lawyer's duty as agent for her client.").

should not be forced to take legal positions contrary to those interests. Doing so may undermine both the Executive Branch's own interests and its relationship with the courts.

### B. *The Executive's Independent Interests*

As discussed above, the Executive Branch has—and should have—its own legal views, and those views will sometimes be distinct from those views that should be advanced to zealously defend a challenged statute.<sup>189</sup> In some cases, the Executive Branch's interests are institutional; indeed, it is in the context of such cases that the Executive, recognizing its own conflict of interest, has historically been particularly likely to decline to exercise its duty to defend. In many other cases, the Executive's interest is not institutional; the Executive Branch simply has a view on a legal question which is contrary to the defense of the statute. Whether institutional or not, the Executive Branch should be able to articulate its own best view of the law not only to influence the courts, but also to make its view of the law clear to the general public.

After all, the role of government lawyers may be to influence judges, not the general public,<sup>190</sup> but the general public nevertheless pays attention when the Executive Branch speaks—probably more so now than ever before. And when the Executive Branch speaks in court, it may be technically representing the United States, but realistically (and reasonably), the public is often going to assume that the views the Executive Branch is expressing are its own.<sup>191</sup> This means not only that the Executive Branch

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<sup>189</sup> See, e.g., Devins & Prakash, *supra* note 20, at 526–32 (discussing the President's “interpretive independence” in the context of analyzing the duty to defend); Miller & Bowman, *supra* note 62, at 65 (“Although the President undoubtedly represents the United States in certain constitutionally delineated areas, this does not establish that the interests of the two entities are interchangeable.”). From this premise, Miller and Bowman reach an arguably surprising conclusion. In their view, “the United States’ is a single entity with multiple heads,” and “perceiving ‘the United States’ as a single entity makes the propriety of the Justice Department judicially challenging an act of Congress dubious at best.” *Id.* at 70, 72. I take the opposite view: because the “United States” is composed of many competing parts, it will not always make sense for only one part to act on behalf of the whole.

<sup>190</sup> See Lee, *supra* note 59, at 600 (“The audience for [the Solicitor General’s] briefs and arguments consists of nine people and nine people only. To the extent that his efforts to persuade those nine people also yield some other benefits, that is fine, but that is not his job. Public relations and mass communications are not what he was trained for and not what he does well.”).

<sup>191</sup> This explains, for example, why the Obama Administration was criticized so vehemently for arguments in an early DOMA filing that were viewed as anti-gay. See, e.g., John Aravosis, *Obama Defends DOMA in Federal Court. Says Banning Gay Marriage Is Good for the Federal Budget. Invokes Incest and Marrying Children*, AMERICABLOG (June 12, 2009, 9:44 AM), <http://www.americablog.com/2009/06/obama-justice-department-defends-doma.html> (describing the brief as “despicable, and gratuitously homophobic”); Kerry Eleveld, *Obama and DOMA: The Unspoken Truth and How We Got Here*, EQUALITY MATTERS (Feb. 24, 2011, 2:59 PM), <http://equalitymatters.org/blog/201102240011> (“[N]early every major LGBT organization eventually denounced the brief . . . .”); Deb Price, *Gays Feel Short-Changed by Obama*, CREATORS.COM, <http://www.creators.com/liberal/deb-price/gays-feel-short-changed-by-obama.html> (last visited Aug. 13, 2012) (describing “Gay Americans” as

may be held accountable for views it does not hold but also that those views may in fact be granted greater legitimacy because they are associated with the President. In other words, forcing the Executive Branch to make arguments in which it does not believe—or prohibiting it from making affirmative arguments in which it does—hurts the President’s ability to effectively use his office as a bully pulpit.

It is again worth noting that I do not take the position that the Executive Branch should (or necessarily even can) decline to defend statutes solely because it disagrees with them as a matter of policy. But the President is just as entitled to share his views on questions of law as he is on questions of policy.<sup>192</sup> And on significant legal questions—such as the constitutionality of laws that discriminate on the basis of sexual orientation—the President may well want to share his views with the general public, in part because of the possibility that the general public’s views might in turn be shaped by the President’s.

Indeed, in cases where the Executive Branch believes that a law is unconstitutional, nondefense provides a means of expressing such opposition that is arguably less problematic than nonenforcement. As I noted above, there are arguments that the Executive can—and even should—decline to enforce laws that it deems unconstitutional.<sup>193</sup> While the arguments about nonenforcement are beyond the scope of this Article, it does seem that there is (at minimum) something more troubling about nonenforcement than nondefense. Because the Executive Branch’s authority to enforce statutes is, in many respects, exclusive, the Executive Branch’s decision not to enforce a statute effectively invalidates the law (at least during the period of nonenforcement), in contravention of the Executive’s proper role in our constitutional system.<sup>194</sup> Equally troubling, it can often (although not always) undermine the possibility of judicial review.<sup>195</sup>

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“infuriated and dismayed by a pair of shockingly anti-gay legal briefs filed by President Barack Obama’s Justice Department”).

<sup>192</sup> See Walter Dellinger, *The DOMA Decision*, NEW REPUBLIC (Mar. 1, 2011, 12:00 AM), <http://www.tnr.com/article/politics/84353/gay-marriage-obama-gingrich-doma?page=0,1> (“I don’t believe that any administration is obliged to urge a court to accept propositions that the president believes are fundamentally wrong . . .”).

<sup>193</sup> See *supra* Parts II, III.

<sup>194</sup> See, e.g., *Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 842 F.2d 1102, 1124 (9th Cir. 1988) (“To construe this duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the ‘take care’ clause: ‘To “execute” a statute . . . emphatically does not mean to kill it.’” (quoting Miller, *supra* note 76, at 398)).

<sup>195</sup> See *id.* at 1125 (“We also note that in declaring the CICA stay provisions unconstitutional and suspending their operation, the executive branch has assumed a role reserved for the judicial branch. It hardly need be repeated that ‘it is emphatically the province and duty of the judicial department to say what the law is.’ . . . The executive branch’s attempt to arrogate to itself the power of judicial review is a paradigmatic violation of our system of separation of powers and checks and balances.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

### C. *The Executive and the Courts*

The Executive Branch's ability to provide the courts with its own best view of the law, irrespective of the effect such a view will have in a particular case, also contributes (in part) to the Executive Branch's special relationship with the courts.<sup>196</sup> Whatever obligations government lawyers may have to their client, the United States, they also "have an obligation to see to it that justice is done."<sup>197</sup> This special obligation carries with it both responsibilities and rewards: the responsibility to temper zealous advocacy with a commitment to the right outcome and the concomitant reward of special respect from the courts. The special relationship between government lawyers and the courts in which they appear is perhaps most evident in the relationship between the Solicitor General and the Supreme Court. Often heralded as the "tenth justice," the Solicitor General enjoys a special relationship with the Court and has a "special duty" toward it.<sup>198</sup> One former Solicitor General has explained that this special duty results in "advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer,"<sup>199</sup> even if that approach sometimes undermines the defense of federal statutes.<sup>200</sup>

As former Solicitor General Robert Bork explained in a letter defending the Solicitor General's decision in *Buckley* to file two briefs taking different positions, "The standing of the Department and the Solicitor General before the Supreme Court . . . rests . . . upon a sense of obligation to the Court and to the constitutional system so that we often

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<sup>196</sup> There is no single explanation for the special esteem in which government lawyers are generally held by the courts, and the quality of their work is surely an important factor in the way they are viewed. *See, e.g.,* Fraley, *supra* note 19, at 1267 ("[I]t is recognized that the work product of the Solicitor General's office is unparalleled.").

<sup>197</sup> W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 *FORDHAM L. REV.* 1333, 1349 (2009) ("Courts similarly state that government lawyers have an obligation to see to it that justice is done, not simply to maximize the likelihood that the client's interests will be achieved."); *see also* Lee, *supra* note 59, at 595–96 ("[There are] three distinct ways in which the government lawyer as a litigator has an enhanced responsibility as an officer of the court . . .").

<sup>198</sup> Cordray & Cordray, *supra* note 42, at 1361. To be sure, there are competing conceptions of the role of the Solicitor General, but fundamental to any view of the Solicitor General is his special relationship with the Court. *See, e.g., id.* ("(1) the Solicitor General as 'tenth justice'; (2) the Solicitor General as advocate for the federal government as an institution; and (3) the Solicitor General as advocate of the President's administration."); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 *CORNELL L. REV.* 831, 878 (2001) ("A large body of literature analyzes the proper role of the Solicitor General in developing the legal positions of the executive branch . . . . Some have claimed that the Solicitor General's role is to serve the interests of the Court, as a sort of super-advisor on the correct answer to legal questions; others stress that the Solicitor General's job is to advocate (within reasonable limits) the legal positions of the executive branch in the Supreme Court." (footnote omitted)).

<sup>199</sup> Lee, *supra* note 59, at 597.

<sup>200</sup> *See* Days, *supra* note 27, at 488.

behave less like pure advocates than do lawyers for private interests.<sup>201</sup> Allowing Executive Branch lawyers “to present the issues in the round,<sup>202</sup> that is, to attempt to present both sides of an argument, facilitates the Executive Branch’s ability to help the courts reach the proper outcome.<sup>203</sup>

If government lawyers forsake this obligation and fail to present the courts with their best view of the law, those actions can undercut the special esteem in which they are generally held. This in turn damages not only the Executive Branch, but also the United States because that special respect, borne out of both the special integrity of government lawyers and the quality of their advocacy, surely contributes to the success that the government generally enjoys in litigation.<sup>204</sup>

To be sure, if the Executive Branch were to begin abandoning the defense of statutes simply because it disagreed with them as a matter of policy—and *not* because it had legitimate questions about their legality—that could also damage the reputation of government lawyers, who are supposed to be influenced by the law, not by politics.<sup>205</sup> But where the Executive Branch has real questions about the legality of a statute—separate and apart from its views regarding the politics and policy of the underlying statute—the Executive Branch is not playing politics when it articulates those views to the courts. It is simply presenting the courts with its best understanding of the law. And the courts can then trust that the Executive is committed to presenting its best view of the law—both in cases where it agrees with the statute as a matter of policy and in cases where it does not.

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<sup>201</sup> Buckley Hearings, *supra* note 60, at 500.

<sup>202</sup> *Id.* at 501.

<sup>203</sup> *See id.* (“[I]n a matter of this significance, a case of perhaps the greatest constitutional significance of this century, it seems to me entirely appropriate that the Court have before it whatever we can add.”).

<sup>204</sup> *See Lee, supra* note 59, at 597 (noting that the Solicitor General must use her power carefully, “lest the reservoir of credibility which is the source of this special advantage be diminished, with adverse consequences not only to the government’s ability to win cases, but also to an important institution of government itself”).

<sup>205</sup> *See, e.g.,* Paul D. Clement, *The Intra-Executive Separation of Powers*, 59 EMORY L.J. 311, 317 (2009) (noting the “temptation” in the Solicitor General’s office to change positions following an election, but arguing that some changes can “come[] at a great cost to the credibility of the Solicitor General and the Office of the Solicitor General before the Court”); Meltzer, *supra* note 72, at 1214 (expressing the concern that an administration’s decision to “reverse course [in defending a statute] will inevitably lead to a charge that the incumbent administration is picking and choosing whether to defend statutes based on its policy preferences”). Of course, the two are not wholly unrelated. Whether one thinks that the health care reform law is unconstitutional may turn in part on one’s understandings about the effect of the uninsured on the rest of the health care market, and whether one thinks DOMA is constitutional may turn on one’s views about the validity of the potential government interests underlying the statute.

## IV. AN ALTERNATIVE DEFENSE

If the Executive Branch should not defend a challenged statute where it has questions about its constitutionality, the critical question remains of what *should* happen. The Executive Branch could, of course, do what it did in *Buckley*, presenting the court with its own best view of the law as well as what it believes to be the strongest arguments in support of the statute. Although I think that approach has much to commend it, it has been only rarely adopted by the Executive Branch, and so I focus on those situations in which the Executive Branch declines to participate at all. In such a case, the absence of executive defense should not mean no defense because the statute's constitutionality should ultimately be determined by the courts and with the assistance of zealous advocates on both sides. I consider first two alternatives to executive defense and then some objections to these proposed alternatives.

## A. Congress

The first and most obvious alternative to executive defense is the one that has historically been most common and that was adopted in the case of DOMA: congressional defense. By statute, the Attorney General is required to “submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice . . . determines . . . to refrain (on the grounds that the provision is unconstitutional) from defending . . . the constitutionality of any provision of any Federal [law].”<sup>206</sup> That notification provides Congress with the opportunity to participate in litigation in defense of challenged statutes when the Executive declines to do so. Indeed, the Senate Legal Counsel was created, at least in part, in response to concerns that the Executive Branch was “failing to defend the constitutionality of some statute[s].”<sup>207</sup>

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<sup>206</sup> 28 U.S.C. § 530D(a)(1) (2006).

<sup>207</sup> See Ludlam Interview, *supra* note 179, at 21–22 (noting that the Senate Legal Counsel was established, in part, because of one of its progenitor's amazement at the fact that “the executive branch, which was supposedly responsible for taking care that the laws be faithfully executed, was failing to defend the constitutionality of some statute[s]”). More generally, the Senate Legal Counsel was a response to Watergate and the perceived need for some institution to represent Congress's interests in court. See *id.* at 15. As a staffer principally responsible for the establishment of the Senate Legal Counsel has explained, prior to its establishment, “there was no office in the Congress that was handling this critical litigation function in defense of the separation of powers and checks and balances. . . . We had a badly flawed, ad hoc system, a patchwork system that left us mostly defenseless against attacks on our constitutional status.” *Id.*; see also *Removing Politics from the Administration of Justice: Hearing on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. 29 (1974) (statement of Sen. Vance Hartke) (“A counsel for the Congress would not be in the business of enforcing the law, but rather he would provide an authoritative interpretation of the laws on behalf of the institution of Congress rather than for the courts to rely solely upon the Justice Department or another party to the case.”). There is no joint counsel because at the time the Senate Legal Counsel was created, the House had an established system for dealing with litigation through its Clerk's Office and thus had no interest in a joint counsel. See Ludlam Interview, *supra* note 179, at 24.

There are two principal legal objections to Congress's participation in this way. First, one might object that it violates separation of powers principles because it permits Congress to participate in the execution of the laws.<sup>208</sup> But for the reasons discussed above,<sup>209</sup> I do not think that defending a law in court is the same as executing the law, and thus I do not think Congress's involvement raises separation of powers concerns. Second, one might object that congressional participation in the defense of statutes raises the thorny problem of legislator standing.<sup>210</sup> I do not think this is a real obstacle to congressional participation either.

As an initial matter, when Congress defends a statute in the Executive's stead, it is not acting for itself but instead for the United States. To put it somewhat differently, Congress is merely acting as the United States' agent in the defense of the validly enacted law that is being challenged in court. Recognizing that there can be complications inherent in the Executive Branch acting as agent for the whole—and that sometimes it is not well-positioned to fulfill that role—simply means that sometimes it will be necessary to find another agent. Congress is a natural choice to fill that role. This is thus quite different than the typical context in which congressional standing is raised, that is, where individual members of Congress are challenging a law.

In any event, even if congressional standing were the appropriate frame for thinking about congressional intervention in this context, such intervention is still meaningfully different than the paradigmatic situation in which individual legislators are challenging a law. In *Raines v. Byrd*, for example, the Supreme Court rejected the standing of six individual members of Congress who sued to challenge the constitutionality of the Line Item Veto Act, concluding that they have “alleged no injury to themselves as individuals.”<sup>211</sup> “[T]he institutional injury they allege,” the Court concluded, “is wholly abstract and widely dispersed . . . , and their attempt to litigate this dispute at this time and in this form is contrary to historical experience.”<sup>212</sup> But in rejecting standing in that case, the Court “attach[ed] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.”<sup>213</sup>

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<sup>208</sup> See *Bowsher v. Synar*, 478 U.S. 714, 726–27 (1986) (“To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws, *Chadha* makes clear, is constitutionally impermissible.”).

<sup>209</sup> See *supra* notes 79–86 and accompanying text.

<sup>210</sup> See *Dessem*, *supra* note 147, at 13 (“[T]he doctrine[] of congressional standing . . . remain[s], at best, in a state of confusion and uncertainty within the District of Columbia Circuit.”).

<sup>211</sup> 521 U.S. 811, 829 (1997).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

After all, whatever one thinks about whether *individual* legislators should have standing, the practice of the Legislature (or a branch of the Legislature) appearing in court to represent its own *institutional* interests seems far less troubling.<sup>214</sup> In fact, the ability of Congress as an institution to participate in litigation has repeatedly been recognized, especially in cases where the Executive Branch has failed to defend the statute at issue. In *INS v. Chadha*, for example, the Court accepted with no hesitation the propriety of Congress's participation, noting that "from the time of Congress' formal intervention . . . concrete adverseness [was] beyond doubt."<sup>215</sup> To be sure, it may be necessary for Congress (acting as agent for the whole) to play a different and more active role in the litigation than it has traditionally played in litigation in the past. Traditionally, Congress's intervention (whether as a party or an amici) has been limited to the courts of appeals or the Supreme Court; if Congress is to act for the United States in the defense of challenged statutes, it may sometimes (as in the case of the DOMA litigation) have to participate in the trial court and assist in the development of the factual record. But there is no reason why Congress's lawyers should not be able to participate in that process.

The most significant problem seems to me to be not a legal one but a practical one. The Senate Legal Counsel and the House General Counsel's Office do not have the focused mission of the DOJ's litigating components

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<sup>214</sup> See, e.g., *Karcher v. May*, 484 U.S. 72, 84–85 (1987) (White, J., concurring in the judgment) ("[W]e have now acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court. . . . It is also clear that because [the legislators] did not seek to intervene as individual legislators in a nonrepresentative capacity, we again leave for another day the issue whether individual legislators have standing to intervene and defend legislation for which they voted."); *Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1126 (N.D. Cal. 2007) (rejecting legislator standing, but noting that "[n]either the Senate nor the House of Representatives as a whole is seeking to compel the submission of the Research Plan or the Scientific Assessment. Nor are the intervenor-applicants alleging they have been authorized to represent their respective Houses of Congress in this action"); *Dessem*, *supra* note 147, at 26 ("In situations where Congress suffers an institutional injury . . . a suit brought by Congress would not pose the same practical problems as do actions by individual Members of Congress."). *But see Barnes v. Kline*, 759 F.2d 21, 44 (D.C. Cir. 1985) (Bork, J., dissenting) (arguing that congressional standing represents a "constitutional upheaval"); see also *Newdow v. U.S. Congress*, 313 F.3d 495, 497 (9th Cir. 2002) ("Let it first be said that the issue is not whether the United States has standing to appear in support of the constitutionality of the statute in question. Nobody doubts that it does. . . . The question is whether the Senate, as a separate part of the government, has standing to intervene to support statutes on its own behalf, and not really as a representative of the United States itself."). The Ninth Circuit did not explain why the Senate was allowed to appear in a series of cases that "directly (particularly) implicated the authority of Congress within our scheme of government" if it could not appear to represent its institutional interests. *Id.* at 498. In any event, it is unclear that even the Ninth Circuit under *Newdow* would object to the Senate representing the United States' interests in the defense of a challenged statute.

<sup>215</sup> 462 U.S. 919, 939 (1983). Admittedly, the Court made that point in its discussion of whether there was a "case or controversy," but that Congress's intervention occasioned no commentary suggests that the Court viewed it as unexceptional.

and thus may need additional resources to help them fulfill this role.<sup>216</sup> Indeed, if the DOJ started to more regularly refuse to defend federal statutes, it might be that Congress's legal offices should receive additional funding and staffing so that they can hire lawyers who will be able to focus exclusively on this responsibility. After all, if the courts are going to rely on the adversarial system to help them determine the constitutionality of federal statutes, we want the adversary defending the statute to be able to provide the strongest defense possible.

### B. *Appointed Counsel*

The existing scholarship on the executive duty to defend seems to assume that in the absence of executive defense, congressional defense is the only alternative. This assumption presumably rests on the premise that if the United States (as embodied in the Congress and the Executive) no longer wants to defend the statute, then there is no live controversy. But recognizing the possibility for temporal tensions between the United States' component parts highlights the fallacy of this approach; by the time a particular statute is challenged, the Congress that enacted it may be gone, and the current Congress may or may not be any better positioned than the Executive to zealously defend it.<sup>217</sup> In other words, recognizing that the current Congress and Executive are, in some cases, not themselves principals, but instead agents for the Congress and Executive that enacted a law in the past, helps explain why there must be alternatives to both executive and congressional defense. A United States law remains good law unless and until it is repealed, and thus it should be defended in court.

After all, if the Congress and the Executive could choose not to defend a law and no one else could replace them, they would be able to do indirectly what they do not have the political will to do directly—that is, repeal the law. Allowing such an implicit repeal would undermine democratic accountability, especially given that congressional nondefense

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<sup>216</sup> See Cobb, *supra* note 78, at 210 (“In addition to the authority to defend a federal statute, the SLC exercises other litigation-related responsibilities . . . includ[ing] bringing a civil action to enforce a subpoena issued by the Senate or one of its subparts, defending against a subpoena . . . , presenting *amicus curiae* arguments, representing the Senate or one of its committees in immunity proceedings, defending the Senate or one [o]f its subparts in a civil action . . . , and performing various advisory duties.” (footnotes omitted)). These offices are relatively recent innovations, responses to the need for offices capable of protecting congressional interests when the Executive Branch did not. See Days, *supra* note 27, at 501 (noting that historically, when “the Executive and Legislative Branches were irretrievably at loggerheads, Congress was forced to hire private counsel or even send one of its own members into court”).

<sup>217</sup> See Days, *supra* note 27, at 503 (identifying one instance in which Congress elected not to defend a statute after the DOJ notified Congress that it would not defend the statute); see also Meltzer, *supra* note 72, at 1211–13 (noting that “congressional pinch-hitting will often not be a full substitute for defense by the executive” because whether Congress will defend a challenged statute “depend[s] upon the political vicissitudes of the moment”).

does not even require a majority vote by both bodies.<sup>218</sup> Moreover, even if there were not accountability concerns, allowing the current Executive and Legislature to undo the work done by a previous Executive and Legislature simply by declaring that work unconstitutional undermines the fundamental role played by the judiciary in our constitutional order.<sup>219</sup> Even if the Legislature and the Executive are entitled to their own independent views on the constitutionality of legislation, their views are not supposed to be the final ones. Rather, the courts should have the final opportunity to consider the constitutionality of legislation after full briefing by those who think the legislation is constitutional, as well as those who do not. Thus, there must be some mechanism for the defense of statutes in those situations where neither the current Executive nor the current Legislature supports the statute.

Indeed, there are numerous examples in the past in which the Senate has declined to take action after being notified that the Executive would no longer defend a statute.<sup>220</sup> And if the Obama Administration had decided not to defend DOMA when Democrats still controlled both houses of Congress, it is entirely possible that neither House of Congress would have elected to defend the statute. After all, the two Democratic members of the House Bipartisan Legal Advisory Group voted against directing the House Counsel to defend the statute, and following that vote, House Minority Leader Nancy Pelosi sent the House Speaker a letter criticizing the decision and asking for an accounting of the costs of the House's involvement in the litigation.<sup>221</sup>

Thus, where neither branch is willing to defend the statute, the courts should appoint lawyers to do so. In such a case, the court-appointed counsel would represent the United States, just as the Executive Branch or Congress would have had they decided to defend the law.<sup>222</sup> There is little reason to think that the court will not be able to find attorneys willing to fulfill that obligation, even when laws are unpopular. Moreover, there is some

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<sup>218</sup> In the House, involvement in litigation is governed by the five-member Bipartisan Legal Advisory Group, not the body as a whole. In the Senate, intervention as an amicus is governed by the body as a whole, but the default is noninvolvement, so no majority vote is required for nondefense. See Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 943–44 (2012).

<sup>219</sup> It could also undermine the uniformity of the law if several circuits struck down the law but then a subsequent president began to enforce the law in those circuits in which it had not been challenged.

<sup>220</sup> See Note, *supra* note 77, at 984.

<sup>221</sup> See Lochhead, *supra* note 54 (“The American people want Congress to be working on the creation of jobs and ensuring the continued progress of our economic recovery rather than involving itself unnecessarily in such costly and divisive litigation.” (quoting Letter from Rep. Nancy Pelosi to House Speaker John Boehner)).

<sup>222</sup> To be sure, there may be some awkwardness in the absence of an actual client capable of providing direction and guidance, but that is also essentially the case when the Executive Branch or Congress is involved. In those cases, as well, the client is the “United States,” but the United States cannot provide any specific guidance or direction. In all of these cases, counsel must simply provide what he or she believes to be the strongest legal arguments in support of the statute’s constitutionality.

precedent for this approach. As Brian Goldman has written about at length, the Supreme Court has made a practice of “tapp[ing] an attorney to support an undefended judgment below, or to take a specific position as an amicus”; by his measure, it has done so forty-three times since 1954.<sup>223</sup> Goldman argues that although the Court has sometimes used this approach inappropriately, as a means of reaching out to decide issues that the parties did not present,<sup>224</sup> it is often appropriate for the Court to do this, including when “the Court has reason to believe that an ongoing controversy exists notwithstanding a respondent’s failure to appear.”<sup>225</sup> The alternative, Goldman explains, is for the Court to “hear a one-sided appeal.”<sup>226</sup> To be sure, there is a difference between the Supreme Court appointing counsel to represent a position on appeal and a lower court appointing counsel to develop the record below, but the point remains that courts sometimes take more active control over cases to ensure that the relevant issues are adequately presented to the court for decision.<sup>227</sup>

And if there is any case in which it is appropriate for the courts to take a more active role it is surely when there is a valid federal law which the current Congress and President are unwilling to defend. This is especially so if the President plans to continue to enforce the law; in such a case, there is a live controversy between the United States and the individuals who are subject to that law. The Supreme Court has recognized as much, noting that “[e]ven [where] the Government largely agreed with the opposing party on the merits of the controversy,” there could be “an adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.”<sup>228</sup> Even if the President has announced

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<sup>223</sup> Goldman, *supra* note 22, at 909. This practice may help prevent Article III problems that could arise if judicial decisions below were left undefended. *Cf.* *United States v. Providence Journal Co.*, 485 U.S. 693, 703–04 (1988) (“[T]he independent ability of the Judiciary to vindicate its authority might appear to be threatened: both [lower] courts would have agreed that the contemner had disobeyed an order of the court, but the Executive’s judgment to the contrary would threaten to undermine those judicial decisions. This threat, however, is inconsequential, for it is this Court . . . that must decide whether to exercise its discretion to review the judgment below, and it is well within this Court’s authority to appoint an *amicus curiae* to file briefs and present oral argument in support of that judgment.”).

<sup>224</sup> *See* Goldman, *supra* note 22, at 971 (arguing that in such cases the Court should “adopt a more minimalist approach,” either denying certiorari or vacating the decision below as moot and remanding to the lower courts).

<sup>225</sup> *Id.* at 970.

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

<sup>227</sup> Although such active involvement by the court is arguably inconsistent with our adversarial system’s emphasis on judicial neutrality, it can facilitate other attributes of the adversarial system by ensuring that both sides of the issue are zealously represented. In the absence of such involvement by the court, the court will either confront a one-sided presentation of the issue or have to engage in independent research on its own.

<sup>228</sup> *See* *INS v. Chadha*, 462 U.S. 919, 940 n.12 (1983) (discussing *Bob Jones Univ. v. United States*, 461 U.S. 574, 585 n.9 (1983)).

that he will not enforce the law, there is arguably still a live controversy if the President's announcement permits him to change course or if a subsequent Executive might remain free to renew enforcement based on past conduct. In such circumstances, the fact that the United States' traditional lawyers have abandoned the statute's defense does not mean that its defense should be abandoned altogether.

### C. Objections

As the objections to the Obama Administration's DOMA decision make clear, the suggestion that the Executive Branch need not always act for the United States in court—and, in fact, sometimes should not—is not uncontroversial. Three objections seem especially likely. First, and most significantly, opponents might worry that this proposal makes it likely that the United States' laws will not be adequately represented. Second, opponents might worry that this proposal will damage comity between the branches. Third, opponents might find something troubling in the United States' representation by court-appointed private counsel.<sup>229</sup>

These are legitimate concerns, but in my view ultimately unpersuasive. Indeed, whether we recognize it or not, the reality is the same: the Executive Branch is just one part of the “United States” and will not always be well-positioned to act as simple agent for the whole. Recognizing that fact does not create these comity and other concerns; rather, it helps address them by ensuring that where the Executive Branch is not positioned to act, someone else will.

First, recognizing that the Executive Branch does not have a duty to defend challenged statutes does not leave United States statutes undefended. Rather, as I discussed above, recognizing that it does not always make sense for the Executive Branch to act as agent for the whole opens the door for others to do so. Whether that responsibility falls to Congress or to court-appointed counsel, someone will be tasked with presenting a zealous defense of the challenged statute. Indeed, because the Executive may not be well-positioned to defend the statute, allowing others to fill that role may actually result in a more robust defense of the challenged statute than would otherwise exist.<sup>230</sup>

Second, former Solicitor General Drew Days has argued that the Executive Branch's defense of statutes that are “not patently

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<sup>229</sup> See Meltzer, *supra* note 72, at 1209–20 (providing thoughtful discussion of other potential problems with executive nondefense, including the “range of considerations that support the practice of enforcing and defending acts of Congress that the executive branch believes to be misguided, offensive, and quite possibly unconstitutional—in which category I would place DOMA and Don't Ask, Don't Tell”).

<sup>230</sup> See Dellinger, *supra* note 192 (arguing that the Obama Administration's decision not to defend means that “the judges will know to look elsewhere for the most all-out, no-holds-barred defense of the law in question”).

unconstitutional but . . . probably unconstitutional” “fosters comity between the Executive and Legislative Branches.”<sup>231</sup> This is certainly true to some degree, but it is important to consider the countervailing costs to the effectiveness of our adversarial system and to the ability of both the Executive Branch and Congress to articulate their own views of the legal question at issue. Indeed, as previously noted, the Executive and Legislative Branches will sometimes have different views on legal questions,<sup>232</sup> and, as General Days himself points out, it will sometimes be the case that “an executive department and an independent regulatory agency are at odds as to what position should be taken in a Supreme Court case involving other parties.”<sup>233</sup> If such disagreements are inevitable, it is not clear that it will always promote comity for the Executive Branch to suppress (or, at minimum, predominate over) the views of the Legislature or independent agencies. It would seem far better in some circumstances to recognize that the Executive Branch cannot always act for the whole and to allow many parties to offer their competing visions of what the Constitution allows and to let the courts make the final determination.

Third, opponents might find something troubling about private attorneys defending the laws of the United States. Although the prospect of private counsel representing the United States may be unusual, it is hardly unprecedented.<sup>234</sup> Private attorneys regularly represented governmental interests early in the country’s history, and, although less common today, they continue to play a role in the representation of the United States. In *Young v. United States ex rel. Vuitton et Fils S.A.*, for example, the Supreme Court recognized that “[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States.”<sup>235</sup> Moreover, in *qui tam*

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<sup>231</sup> Days, *supra* note 27, at 502. General Days is, of course, not alone in this view. *See, e.g.*, Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 126 (2004) (noting that “presidential practices,” such as “defend[ing] acts of Congress that in their view are unconstitutional, as long as a reasonable argument can be made in support of the law . . . reflect respect for the Court and Congress and are consistent with the general separation of powers”).

<sup>232</sup> *See supra* notes 147–58 and accompanying text.

<sup>233</sup> Days, *supra* note 27, at 496.

<sup>234</sup> To be sure, there can sometimes be difficult questions about what actions must be taken by the United States, as opposed to private parties. *See, e.g.*, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2185 (2010) (Roberts, C.J., dissenting) (disagreeing with the court below that an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person because “[t]he terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government”). But again the defense of challenged statutes does not involve private parties acting for the United States as much as providing one view of what the United States’ interests are in a particular case.

<sup>235</sup> 481 U.S. 787, 804 (1987) (“A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.”).

actions, a private party brings suit in the name of the government to represent its interests.<sup>236</sup> Although the United States is not, strictly speaking, a “party” to such cases, it nonetheless is a “real party in interest,” and its interests are thus being represented by a private party.<sup>237</sup> Finally, private attorneys have also been retained to represent both the Congress and the Judiciary on a number of occasions.<sup>238</sup>

At the end of the day, the concerns about executive nondefense all reflect the very reasonable concern that the United States’ laws should be defended and defended well. The question is simply how best that can be accomplished. Recognizing that the Executive Branch may not always be able to serve as a simple agent for the whole suggests that the best interests of the United States do not always rest in executive defense. Often (and perhaps even ideally) they will, but where they do not, recognizing the validity of executive nondefense should harm neither the Executive nor the United States and should instead help both. It should ensure that the Executive Branch can represent its own interests and protect its own integrity before the courts and the public, and it should ensure that the laws of the United States are represented by those best positioned to do so.

#### V. BEYOND “DUTY TO DEFEND”

In this Article, I have focused on one context in which the assumption that the Executive Branch should always act as simple agent for the whole is, in my view, both well-established and wrong. And it is wrong because it fails to appreciate that the Executive Branch is no simple agent and that significant consequences can follow when a part of the United States acts for the much more complicated whole. But the issues I have discussed in the context of the Executive Branch’s so-called duty to defend are not limited to that context. To the contrary, they provide reason to think more broadly about what it means for the Executive Branch to act as agent for the whole. The notion that the growth of the administrative state poses a risk of “systematic departmental self-aggrandizement” is not new,<sup>239</sup> but the growth

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<sup>236</sup> See 31 U.S.C. § 3730(b)(1) (2006) (“A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.”).

<sup>237</sup> See *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934 (2009). To be sure, the Supreme Court has concluded that a “court-appointed prosecutor who sought certiorari and briefed and argued the case without the authorization of the Solicitor General may not represent the United States,” *United States v. Providence Journal Co.*, 485 U.S. 693, 695 (1988), but the question would have been an entirely different one had the Solicitor General authorized the special prosecutor to represent the United States, as it presumably would in cases where it has waived its right to defend the statute, *see id.* at 698–99.

<sup>238</sup> See *Providence Journal*, 485 U.S. at 712–13 (Stevens, J., dissenting) (collecting cases).

<sup>239</sup> Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 953 (2005); *see also* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (“[T]he risks of unchecked executive

of the administrative state is more symptom than cause. Inherent in our institutional design is the possibility for divergence between those who make the law and those who execute it, as well as the merger of lawmaking and law-executing functions in a single branch. Even if checks and balances were supposed to counteract such risks, they have clearly proven insufficient in practice.<sup>240</sup>

There are many contexts in which the Executive Branch purportedly acts on behalf of the United States, even though other parts of the United States have a role to play in determining the United States' substantive policy positions, and even though there may be significant disagreement about how the United States should carry out those substantive policy goals.<sup>241</sup> In many of these cases, the Executive Branch will be in some sense both principal and agent; it will have responsibility for substantive policymaking, but it will also be acting to effectuate policy goals reached in part by other components of the government.<sup>242</sup>

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power have grown to the point where dispatch has become a worn-out excuse for capricious activity.”); Jonathan Macey, *Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 *YALE L.J.* 2416, 2418 (2006) (“The ascendancy of the executive branch in policymaking is an unintended consequence of the modern administrative state. The emergence of the executive branch as the fulcrum of power within the administrative state represents a deviation from the traditional balance of powers among the three branches of government.”).

<sup>240</sup> See, e.g., James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 *ST. JOHN'S L. REV.* 293, 308 (2005) (“And why have political actors not only failed to resist incursions on their power, but frequently acquiesced in a diminution of their own authority? Government officers seemingly had at their disposal all the tools necessary to fight off depredations committed by other branches, yet they chose to cooperate rather than to resist.”); Katyal, *supra* note 239, at 2320 (“In most instances today, the only way for Congress to disapprove of a presidential decree, even one chock full of rampant lawmaking, is to pass a bill with a solid enough majority to override a presidential veto.”); Levinson & Pildes, *supra* note 16, at 2313 (“Few aspects of the founding generation’s political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers.”).

<sup>241</sup> The examples are numerous, if not endless. For example, the Executive Branch generally acts for the United States in its relations with other countries (both peaceful and otherwise), even though Congress also has a substantial role to play in determining the nation’s substantive policy in that area through, for example, its power to declare war and to regulate commerce with foreign nations. The Executive Branch also, as noted earlier, has exclusive responsibility for enforcing the nation’s laws, even though Congress clearly has a significant role to play in determining what those laws are. Although the contexts in which this issue arises are numerous, each one is unique—both in terms of the respective responsibilities of the branches and the amount of discretion the Executive Branch is supposed to have in its actions on behalf of the whole.

<sup>242</sup> The Executive Branch’s role as agent for the whole is even more complicated when independent agencies are involved. In such cases, the agency may not require legislative appropriations for its financing, its top officials may be free from presidential control, and significant portions of the staff may be appointed independently of both the President and Congress. These independent agencies can nonetheless wield considerable power. The Chairman of the Federal Reserve, for example, has been described as “the nation’s most powerful economic policymaking job.” Michael D. Shear & Neil Irwin, *Bernanke to Be Reappointed as Fed Chairman*, *WASH. POST*, Aug. 25, 2009, at A1.

This duality of the Executive Branch's role creates the possibility that the Executive Branch will expand its own powers by purporting to act for the United States even when it has no authority to do so.<sup>243</sup> When administrative agencies are acting for the United States to determine what its laws mean (and how they should be enforced), an administrative agency's views may vary from what Congress intended when it enacted the law.<sup>244</sup> Or when the Executive Branch is acting for the United States in hearings before the World Trade Organization and commits the United States to take certain trade-related actions, the Executive Branch may take a position with which Congress (which also has a role to play in regulating our trade with foreign nations<sup>245</sup>) disagrees.

This possibility for unauthorized executive branch action raises serious accountability and legitimacy concerns. For example, if the Executive Branch takes some action abroad, it will generally be viewed as the action of the United States—and the United States will be held accountable—regardless of whether any other part of the United States supported the action. There may also be questions about the legitimacy of the Executive Branch's action if it did not enjoy the support of the Legislature or at least did not follow the proper processes before acting. Consider, for example, the recent military actions in Libya.<sup>246</sup> The fact that the President acted without congressional consent did not make it any less the action of the United States in the eyes of the world. The President's action may or may not have been lawful—there was apparently disagreement within the

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<sup>243</sup> Cf. Cass R. Sunstein, *What's Standing After Lujan?: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 212 (1992) ("[T]he Take Care Clause confers a duty insofar as it imposes on the President both a responsibility to be faithful to law and an obligation to enforce the law as it has been enacted, rather than as he would have wished it to be.").

<sup>244</sup> Or the administrative agency's views may have changed over time. Or different administrative agencies will have different views regarding what the law means. The possible complications are many. See Rodriguez, *supra* note 19, at 1199–1200 ("[T]he President, through various control devices . . . [can] use[] his office to interpose himself between legislators' preferences as reflected in their directions to administrators as well as the preferences of the administrators themselves."). To be sure, agencies will, at least in theory, have to justify their regulation with reference to the underlying statute, but broad statutory language will often give agencies wide scope to implement the Executive Branch's policy preferences.

<sup>245</sup> See, e.g., U.S. CONST. art. I, § 8 (giving Congress the power to "regulate Commerce with foreign Nations").

<sup>246</sup> In 2011, civil war erupted in Libya between supporters of Muammar el-Qaddafi and those trying to overthrow his government, see, e.g., David D. Kirkpatrick & Mona El-Naggar, *Son of Qaddafi Says Libya Faces Civil War Peril*, N.Y. TIMES, Feb. 21, 2011, at A1, and controversy erupted in Washington, D.C. over how, if at all, the United States should respond, see, e.g., David E. Sanger & Thom Shanker, *Discord Grows on the Politics of Intervention*, N.Y. TIMES, Mar. 8, 2011, at A1. President Obama ultimately decided that the United States should intervene in the conflict. See, e.g., David E. Sanger, *Possible Libya Stalemate Puts Stress on U.S. Policy*, N.Y. TIMES, Apr. 12, 2011, at A8.

Executive Branch on that very question<sup>247</sup>—but regardless of its legality, its significance as an action *of the United States* is beyond dispute.

In theory, at least, there are checks on unauthorized executive branch action. For example, the nondelegation doctrine requires Congress to include guiding principles when it delegates power to administrative agencies so that there is some limitation on their power to act.<sup>248</sup> But even if the nondelegation doctrine were not essentially a dead letter,<sup>249</sup> this check provides no recourse if the Executive Branch chooses to disregard a limitation contained in the statute. And although there will sometimes be opportunities for parties to challenge an executive branch action that is in tension with a statutory requirement, various justiciability doctrines, which limit which parties may bring claims in court and what kind of claims they may bring, mean that just as often there will not be such an opportunity.<sup>250</sup> For example, if the Executive Branch initiates military action, there may be statutes that purport to limit the Executive Branch's authority in the absence of congressional consent. But that theoretical check is often meaningless because, as the prior discussion of political question doctrine revealed, courts will decline to intervene in such a dispute between the Executive Branch and Congress.<sup>251</sup>

Thus, there may be many cases in which existing processes are insufficient to ensure that, when the Executive Branch is purporting to act as agent for the United States, it truly is, or in which we improperly assume

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<sup>247</sup> See Charlie Savage, *2 Top Lawyers Lose Argument on War Powers*, N.Y. TIMES, June 18, 2011, at A1.

<sup>248</sup> See, e.g., *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>249</sup> See, e.g., Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 703 (2006) (“Various scholars have declared the Non-Delegation Doctrine, which was first announced by the Supreme Court in *Field v. Clark*, to be dead.” (footnote omitted)).

<sup>250</sup> See, e.g., Katyal, *supra* note 239, at 2321 (“[T]he executive branch has gained power from deference doctrines that induce courts to leave much conduct untouched . . . .”); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 511 (2008) (“Because of justiciability limitations, many of the questions surrounding the scope of presidential power, such as war powers, never reach the courts.” (footnote omitted)); cf. Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1200 (1993) (noting that the reasoning in the majority opinion in *Lujan* “reallocates power among the institutions of government in three related ways,” including by “confer[ring] on agencies discretion to ignore many congressional policy decisions”).

<sup>251</sup> See *supra* notes 91–93 and accompanying text; see also *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 857 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment) (“Applying the political question doctrine in statutory cases thus would not reflect benign deference to the political branches. Rather, that approach would systematically favor the Executive Branch over the Legislative Branch—without the courts’ acknowledging as much or grappling with the critical separation of powers and Article II issues.”). Unsurprisingly, the Obama Administration has argued that a suit filed by members of Congress challenging the United States’ actions in Libya should be dismissed on political question grounds. See Memorandum in Support of Defendants’ Motion to Dismiss 13–21, *Kucinich v. Obama*, No. 1:11-cv-01096 (RBW) (D.D.C. Aug. 19, 2011).

that the Executive Branch alone must be the United States' exclusive agent. And this is because our failure to appreciate the complexities of the principal-agent problem in the context of executive branch action leads us to assume that it is always unproblematic for the Executive Branch to act as agent for the whole. In the duty-to-defend context, I have argued that the Executive Branch need not always be the United States' exclusive agent, and, in fact, it is better for both the Executive Branch *and* the United States if others represent the United States when the Executive Branch has questions about the statute's constitutionality.

In other cases, it may be that the Executive Branch should act for the United States because unity of action is necessary, but we need more robust means of ensuring that the Executive Branch is truly acting for the United States and not just for itself. To be sure, there will not always be consensus among the United States' competing parts as to any particular substantive policy goal. But there should be consensus—or at a minimum established rules—for determining which part (or parts) should have a role in determining what those substantive policy goals are and what actions the Executive Branch should take to advance them. And there should also be some means of ensuring that those rules are followed. For example, it may be that recognizing these complexities provides reason to rethink justiciability doctrines, such as political question doctrine, that limit the ability of the courts to consider congressional challenges to executive branch action. Or it may be that there are certain contexts in which the Executive Branch should not be allowed to act in the absence of prior congressional approval.

Determining all of the various complications of the principal-agent problem in this context—and determining how those complications are best addressed—is beyond the scope of this Article. My point here is simply to point out that the issues I discussed in the context of the Executive Branch's duty to defend challenged statutes have implications that extend well beyond that specific context. Although recognizing the complications that can arise when one part of the United States acts on behalf of the whole does not tell us how to deal with those complications—indeed, differences across contexts make any facile answer impossible—recognizing the existence of those complications is nonetheless an important first step. We cannot begin to address the problem until we recognize that it exists.

#### CONCLUSION

As attractive as the picture of the Executive Branch as a simple agent may be, that idea is belied by a much more complicated reality, a reality of multiple principals with different, at times mutually exclusive, interests and an agent that is at once both principal and agent. This insight provides new ways of thinking about executive branch action and suggests that it may not always be possible for one part of the United States to act

unproblematically for the whole. That insight may not tell us when it is appropriate for one part to act on behalf of the whole—or what checks are necessary to ensure that the part is acting in an authorized manner—but it does at least ensure that we are recognizing the potential problem and searching for context-specific ways to solve it.

In this Article, I have focused on one particular context in which the view that the Executive Branch always can—and should—act as agent for the whole is well-entrenched and, in my view, wrong: the Executive Branch's so-called duty to defend challenged statutes. I have argued that the Executive Branch should not defend a challenged statute where it has questions about the statute's constitutionality. By recognizing that the United States has many constituent parts that at times have conflicting interests, it becomes clear that the United States and the Executive Branch are not one and the same and that sometimes the interests of both are better served by executive nondefense, rather than defense. By recognizing that, we can ensure that whatever entity represents the United States in court is truly representing the United States' interests and not merely its own.