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# ESSAY

## DEFENDING CONGRESS

SETH P. WAXMAN\*

Last year, the Attorney General received a letter from the Speaker of the House of Representatives.<sup>1</sup> The letter concerned the position the United States had taken in a case then pending in the Supreme Court styled *Dickerson v. United States*.<sup>2</sup> The letter questioned whether the decision of the Department of Justice in that case not to defend the constitutionality of a 1968 law<sup>3</sup>—a law that sought to overrule the Supreme Court’s 1966 decision in *Miranda v. Arizona*<sup>4</sup>—was consistent with the constitutional duty of the Executive to “take Care that the Laws be faithfully executed.”<sup>5</sup>

The Speaker’s letter surfaced an issue at the core of the Solicitor General’s responsibility—the responsibility to ascertain and represent the interests of the United States in litigation. The issue is this: If the constitutionality of an Act of Congress is challenged in court, when, if ever, does the Solicitor General’s responsibility permit, or require, him not to defend the Act?

The issue is particularly salient these days because we are living in a period of constitutional ferment. For most of our nation’s history, the Supreme Court only rarely struck down federal statutes on constitutional grounds. Often, years went by without it happening even once. The Court reiterated time and again that the “judicial power to hold [an] act unconstitutional[] is an awesome responsibility

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1. Letter from Dennis P. Hastert, Speaker of the House of Representatives, to Janet Reno, Attorney General (Feb. 16, 2000) (on file with the North Carolina Law Review).

2. 530 U.S. 428 (2000).

3. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210–11 (codified as amended at 18 U.S.C. §§ 3501–3502 (1994)).

4. 384 U.S. 436 (1966).

5. U.S. CONST. art. II, § 3.

calling for the utmost circumspection in its exercise.”<sup>6</sup> During the entire first 200 years following ratification of the Constitution, only 127 federal laws were struck down—even accounting for the many laws that fell victim to the New Deal’s head-on collision with the Supreme Court in the tumultuous 1930s.<sup>7</sup>

These days, however, the extraordinary act of one branch of government declaring that the other two branches have violated the Constitution has become almost commonplace. Since 1995, the Court has invalidated twenty-six different federal enactments,<sup>8</sup> and its

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6. *Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 2 (1964); *see also, e.g.*, *United States v. Brown*, 381 U.S. 437, 462 (1965) (“This Court is always reluctant to declare that an Act of Congress violates the Constitution, but in this case we have no alternative.”); *The Sinking Fund Cases*, 99 U.S. 700, 718 (1878) (“One branch of the government cannot encroach on the domain of another without danger.”); *Mayor v. Cooper*, 73 U.S. 247, 251 (1867) (“This Court has the power to declare an Act of Congress to be repugnant to the Constitution, and therefore invalid. But the duty is one of great delicacy, and only to be performed where the repugnancy is clear, and the conflict unreconcilable.”).

7. The cases are listed chronologically in CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION* 2001–31 (Johnny H. Killian & George A. Costello eds., 1992) (Sup. Doc. No. 103-6).

8. *See Velazquez v. Legal Servs. Corp.*, 121 S. Ct. 1043, 1052 (2001) (striking down a 1996 amendment to the Legal Services Corporation Act of 1974 that prohibited LSC recipients from using the federal funds received under this Act to challenge existing welfare law as a violation of the First Amendment); *Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 967–68 (2001) (holding that a state employee may not sue a state in federal court for state violations of Title I of the Americans with Disabilities Act); *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (holding that Congress may not enact legislation superseding *Miranda v. Arizona*, 384 U.S. 436 (1966)); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 827 (2000) (invalidating section 505 of the Telecommunications Act of 1996); *United States v. Morrison*, 529 U.S. 598, 618–19 (2000) (invalidating the civil remedy provision in the Violence Against Women Act, which provided for victims of gender-motivated bias); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66–67 (2000) (invalidating the state immunity abrogation provisions of the Age Discrimination in Employment Act of 1967); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (invalidating a provision of the Fair Labor Standards Act of 1938 authorizing private actions against states); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999) (concluding that the Trademark Remedy Clarification Act cannot abrogate state immunity); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 648 (1999) (invalidating provisions of the Patent Remedy Act because Congress does not have the power to abrogate state immunity); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 176 (1999) (invalidating 18 U.S.C. § 1304’s lottery broadcasting prohibition as applied to gambling advertisements in states where gambling is legal); *Eastern Enters. v. Apfel*, 524 U.S. 498, 538 (1998) (invalidating the Coal Industry Retiree Health Benefit Act of 1993 as applied to the case); *Clinton v. New York*, 524 U.S. 417, 448 (1998) (invalidating the Line Item Veto Act); *United States v. United States Shoe Corp.*, 523 U.S. 360, 363 (1998) (invalidating the Harbor Maintenance Tax on exports); *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 342 (1998) (holding that a jury trial must be held despite the lack of a specific requirement under copyright infringement

pending merits docket includes several other constitutional challenges to federal statutes.<sup>9</sup>

Several theories have been advanced to explain this marked recent trend: I do not propose to discuss any of them here. For whatever reason, constitutional adjudication has undergone a

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remedies laid out in 17 U.S.C. § 504(c)); *Printz v. United States*, 521 U.S. 898, 933 (1997) (invalidating certain provisions of the Brady Act); *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (invalidating two provisions of the Communications Decency Act of 1996); *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (invalidating the Religious Freedom Restoration Act of 1993); *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997) (invalidating sections of the Indian Land Consolidation Act); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 733 (1996) (invalidating two provisions of the Cable Television Consumer Protection and Competition Act of 1992); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996) (invalidating one application of a provision of the Federal Campaign Act of 1971), *cert. granted sub nom. FEC v. Colo. Republican Fed. Campaign Comm.*, 121 S. Ct. 296 (2000); *United States v. IBM Corp.*, 517 U.S. 843, 845 (1996) (invalidating section 4371(1) of the Internal Revenue Code); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (invalidating a provision of the Indian Gaming Regulatory Act); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating a provision of the Gun-Free School Zones Act of 1990); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995) (invalidating a provision of the Federal Alcohol Administration Act); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (invalidating a provision of the Securities Exchange Act of 1934); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 457 (1995) (invalidating a provision of the Ethics in Government Act of 1978).

9. *Alexander v. Sandoval*, No. 99-1908, 2001 U.S. LEXIS 3367, \*33 (U.S. Apr. 24, 2001) (holding that no implied private right to action exists to enforce administrative regulations against a state agency); *Calcano-Martinez v. INS*, 232 F.3d 328, 332 (2d Cir. 2000) (questioning whether Immigration Act amendments, which preclude aliens all review of challenges to final removal orders, violate due process or the Suspension Clause), *cert. granted*, 121 S. Ct. 849 (2001); *FEC v. Colo. Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1223 (10th Cir. 2000) (questioning the constitutionality of section 441a(d)(3) of Federal Election Campaign Act), *cert. granted*, 121 S. Ct. 296 (2000); *Nguyen v. INS*, 208 F.3d 528, 531 (5th Cir. 2000) (challenging a distinction in 8 U.S.C. § 1409 between out-of-wedlock children born overseas to parents who are United States citizens), *cert. granted*, 530 U.S. 1305 (2000); *Hatter v. United States*, 203 F.3d 795, 796 (Fed. Cir. 2000) (en banc) (questioning the constitutionality of extending Medicare and Social Security taxes to salaries of sitting Article III judges), *cert. granted*, 121 S. Ct. 338 (2000); *Bartnicki v. Vopper*, 200 F.3d 109, 113-14 (3d Cir. 1999) (challenging 18 U.S.C. § 2520(c)(2)(3), a section of the Electronic Communications Privacy Act of 1986), *cert. granted*, 530 U.S. 1261 (2000); *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1086 (9th Cir. 1999) (contesting the constitutionality of Child Pornography Prevention Act of 1996), *cert. granted*, 121 S. Ct. 876 (2001); *United Foods, Inc. v. United States*, 197 F.3d 221, 222 (6th Cir. 1999) (challenging the constitutionality of assessments imposed by 1950 Mushroom Promotion Research and Consumer Information Act), *cert. granted*, 121 S. Ct. 562 (2000); *Zadvydas v. Underdown*, 185 F.3d 279, 283 (5th Cir. 1999) (questioning whether prolonged, indefinite detention of aliens ordered deported pursuant to 8 U.S.C. § 1231(a)(6) violates the Constitution), *cert. granted*, 121 S. Ct. 297 (2000); *Ill. Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 568 (7th Cir. 1999) (questioning whether suit against state commission under section 242(a)(6) of the Telecommunications Act of 1996 violates sovereign immunity of Eleventh Amendment), *cert. granted*, 121 S. Ct. 1224 (2001).

thoroughgoing paradigm shift. My question is: How does, and should, the shift affect the function of the Solicitor General?

Before I get right to the point—or rather to help me get to the point—let me provide some context. Every year the Solicitor General must decide, one case at a time, what the interests of the United States are with respect to several thousand different cases in the federal and state courts. Should the United States appeal, or seek rehearing, or petition for certiorari, or file a brief *amicus curiae*, or intervene?<sup>10</sup> What issues should the United States raise, and what arguments should it make? How should the law be interpreted or the doctrine applied? The goal is for the United States to speak with one voice—a voice that reflects the interests of all three branches of government and of the people. How on earth is that done? It is a little like asking a millipede how it knows which foot to put first.

Many lofty statements have been uttered by my predecessors. Solicitor General Frederick Lehmann wrote that “[t]he United States wins its point whenever justice is done its citizens in the courts.”<sup>11</sup> Simon Sobeloff reflected that “[t]he Solicitor General is not a neutral; he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. . . . [N]ot to achieve victory, but to establish justice.”<sup>12</sup>

Passages like that are inspirational. Perhaps they are even reassuring, because in a sense they mean that even when the Solicitor General loses a case, he wins. But they offer little in the way of practical guidance. Reflecting on his tenure, Francis Biddle wrote that, for the Solicitor General, “the client is but an abstraction.”<sup>13</sup>

I do not think that is quite right. But it is true that discerning the interests of the United States as a client is a uniquely challenging and rewarding responsibility. It is the most important responsibility the Solicitor General has. And the key to doing it lies in process. Let me explain what I mean.

Like judges, the Solicitor General is a reactive creature; every decision he makes comes in the context of a specific request from a Cabinet department, an independent agency, a United States Attorney, or a litigating division of the Department of Justice. In every instance, the process begins with a written analysis and

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10. Officer of the Solicitor General: General Functions, 28 C.F.R. §§ .20–.21 (2000).

11. LINCOLN CAPLAN, *THE TENTH JUSTICE* 17 (1987) (quoting Solicitor General Frederick Lehmann).

12. Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (1955).

13. FRANCIS BIDDLE, *IN BRIEF AUTHORITY* 97 (1962).

recommendation, which is then circulated to every government component that might conceivably have an interest in the matter. These components in turn prepare their own analyses and share them with each other. I recall cases from my tenure in which as many as a dozen different agencies and components have expressed views.

After all of these memos are in, an Assistant to the Solicitor General prepares an independent analysis and recommendation; a Deputy writes another; and the entire package lands on the Solicitor General's desk for decision. Ordinarily, between five and ten of these recommendation packages arrive every day. Most are reasonably straightforward, but sometimes the recommendations differ widely. Meetings are convened in which representatives of each component gather to consider each other's views, with the Solicitor General trying to reconcile differences and fashion a single coherent position.

These meetings are about the most exciting and challenging thing the Solicitor General gets to do. It is genuinely thrilling to collaborate with a collection of dedicated government lawyers—each of whom brings to the table the unique perspective of the component he represents—for the purpose of trying to arrive at a position that will fairly reflect the views of the United States as a whole. Sometimes it just cannot be done. But in a surprisingly large percentage of cases, a position can be developed that leaves everyone satisfied—or at least equally dissatisfied. The beauty of the system is that each government component reflects a unique conception of on what constitutes the interest of the United States. In that way, the government acts as a microcosm of the country as a whole, mirroring the complexity and diversity of American views.

The process often includes advocacy by lawyers for other parties to the litigation and sometimes by attorneys for other persons or entities that are not directly involved with the litigation but nonetheless have an interest in the case or the issue. The process always involves the Solicitor General's independent evaluation of the relative importance of each case and the cost of pursuing it. As a party in about forty percent of all cases in the federal courts, the United States appeals only a small fraction of the decisions it loses, and it petitions for rehearing or certiorari only rarely. Solicitors General understand the cataclysmic effects that a less-discriminating process would have on the judicial system.

When an Act of Congress is challenged, the process remains much the same, but the calculus alters somewhat. The situation differs because a decision about how to respond to a constitutional challenge implicates in the most direct way the Solicitor General's

responsibility to account for the interests of all three branches of government.

In the unique context of a constitutional challenge to legislation, the interests of the Congress and the Executive are generally pretty clear: they have spoken. And as a result, at least when those interests do not conflict with the Solicitor General's duty to the courts, the Department of Justice defends Acts of Congress in all but the rarest of cases. Except in two well-recognized circumstances, which I will discuss momentarily, the Solicitor General generally defends a law whenever professionally respectable arguments can be made in support of its constitutionality. Unlike litigation decisions in other cases, when an Act of Congress has been challenged, the Solicitor General ordinarily puts a heavy thumb on the scale.

Vigorously defending congressional legislation serves the institutional interests and constitutional judgments of all three branches. It ensures that proper respect is given to Congress's policy choices. It preserves for the courts their historic function of judicial review. And it reflects an important premise in our constitutional system—that when Congress passes a law and the President signs it, their actions reflect a shared judgment about the constitutionality of the statute. In the mine run of cases, it is fair to presume that the Congress that passed the legislation and the President who signed it were of the view that the law conformed to the Constitution as construed by the Supreme Court. In such cases, Solicitors General defer to Congress and the President's articulation of the constitutional "interests of the United States," as reflected in the enactment. They do not attempt to reach our own best view of a statute's constitutionality; rather, they try to craft a defense of the law in a manner that can best explain the basis on which the political branches' presumed constitutional judgment must have been predicated.<sup>14</sup>

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14. Note the salient difference between a decision by the Executive not to *defend* an Act of Congress from the analogous, but quite distinct, decision a President may make not to *enforce* the law. For a seminal treatment of the issues surrounding the latter, controversial practice, see Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 927–29 (1990) (arguing that the Executive may appropriately decline to enforce the law). *But see* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 1010–11 (1994) (arguing that the Executive may decline to enforce only in rare cases). Unlike a decision not to enforce a statute at all, the practice of "enforce but decline to defend" permits the will of Congress to be honored in the first instance, allows the Executive Branch to make its views known to the Court, and ordinarily places before the Court the opportunity to resolve the constitutional dispute between the other two branches. Some commentators argue that the enforce-but-decline-to-defend equilibrium represents in many cases

Let me provide an example some people chuckle to recall. In 1996, Congress passed a law known as the Communications Decency Act.<sup>15</sup> The law was enacted without hearings or committee consideration. It imposed criminal penalties on anyone who made available to minors on the Internet material that was “indecent” or “patently offensive.”<sup>16</sup> The Act was challenged before two three-judge district courts.<sup>17</sup> All six judges found the law facially unconstitutional in every respect.<sup>18</sup> The Justice Department’s Civil Division recommended appeal to the Supreme Court, and my predecessor as Solicitor General agreed. Having argued the case, I can confirm that there is nothing quite like standing in front of the Supreme Court to defend the constitutionality of a law that not a single judge has ever found to be constitutional in any respect. The United States did lose (although we garnered two votes for two-thirds of the statute).<sup>19</sup> But our adversarial system of constitutional adjudication was served. The United States’ briefs served the valuable purpose of articulating for the Supreme Court the strongest possible rationale in support of constitutionality—a much stronger case than anything that had been articulated by or to Congress. Those arguments in turn prompted the parties challenging the statute to hone and improve their own positions. And when the Court concluded that the statute should be invalidated, it did so with assurance that it had considered the very best arguments that could be made in its defense.

Often, defending Acts of Congress leads the Solicitor General to lean heavily on the *Ashwander* principle of construing a statute so as

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constitutionalism at its best, because it forces the Executive Branch to put its money where its (constitutional) mouth is and tests those views in the crucible of Supreme Court litigation. See, e.g., Dawn Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 59 (2000) (arguing that President Clinton’s refusal to defend an HIV law was the best course of action). Seen in that light, it is much less risky than the refuse-to-enforce paradigm, which courts the peril that the Executive will use the Constitution as a pretext for what are, in fact, policy disagreements with a statute. Whatever objections one might make under the Take Care Clause, U.S. CONST. art. III, § 3, to a practice of nonenforcement, those concerns are virtually nonexistent in the nondefense context, since both the Executive and the Legislature ultimately abide by the Court’s constitutional ruling.

15. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. §§ 223(a) and (d) to (h) (1994 and Supp. IV 1998)).

16. 47 U.S.C. § 223(d)(1)(B).

17. *Shea v. Reno*, 930 F. Supp. 916, 922 (S.D.N.Y. 1996), *aff’d*, 521 U.S. 1113 (1997); *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844, 849 (1997).

18. *Shea*, 930 F. Supp. at 922; *ACLU*, 929 F. Supp. at 849.

19. *Reno v. ACLU*, 521 U.S. 844, 886–97 (1997) (Rehnquist, C.J., and O’Connor, J., dissenting in part and concurring in part).



to avoid constitutional doubt.<sup>20</sup> One recent example involved the construction we advocated for the so-called "automatic stay" provision of the Prison Litigation Reform Act.<sup>21</sup> In courts across the country, every prisoner who challenged that provision, and every State that defended it, agreed that the statute requires, inexorably, that decrees in prison reform cases be suspended ninety days following a motion to terminate them—no matter how complex the case may be or how busy the district judge may be.

The United States intervened in all of these cases to defend the constitutionality of the provision in question. We urged courts to reject the strict reading advocated by all of the parties and instead to interpret the provision to continue to permit courts, in extraordinary instances, to exercise their traditional equitable powers. Two of the three courts of appeals that considered the question adopted our interpretation and sustained the statute on that ground.<sup>22</sup> The Seventh Circuit rejected our interpretation and struck down the statute.<sup>23</sup> The Supreme Court disagreed with everyone. Although it rejected the United States' proffered interpretation, it did uphold the statute.<sup>24</sup> Reading Justice O'Connor's opinion for the Court, one can see that we got at least 100 style points for our effort at statutory construction.<sup>25</sup>

Sometimes, in its zeal to defend Acts of Congress the Department of Justice outdoes even itself. Five years ago, a case was filed in federal court in Minnesota challenging the constitutionality of some longstanding provisions of the Medicare and Medicaid Acts.<sup>26</sup> These provisions gave special treatment to Christian Science nursing services in sanatoria "operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts."<sup>27</sup> (Yes, even the

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20. *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

21. *Miller v. French*, 530 U.S. 327, 350 (2000) (upholding a provision of the Prison Litigation Reform Act of 1995).

22. *Ruiz v. Johnson*, 178 F.3d 385, 387 (5th Cir. 1999); *Hadix v. Johnson*, 144 F.3d 925, 930 (6th Cir. 1998).

23. *French v. Duckworth*, 178 F.3d 437, 446 (7th Cir. 1999), *rev'd sub nom.* *Miller v. French*, 530 U.S. 327, 350 (2000).

24. *Miller*, 530 U.S. at 350.

25. *Id.* at 341.

26. *Children's Healthcare is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466, 1468 (D. Minn. 1996) (challenging provisions of 42 U.S.C. § 1395 covering medical expenses at Christian Science facilities), *cert. denied sub nom.* *Children's Healthcare is a Legal Duty, Inc. v. McMullan*, 121 S. Ct. 1483 (2001).

27. *Id.* at 1469 (quoting 42 U.S.C. § 1395x(e) (1994)).

address of the Church was listed in the United States Code.) The Department's Civil Division fought valiantly in the district court to no avail.<sup>28</sup> But when the case came to my predecessor for authorization to appeal, he considered it a bridge just too far to cross.

This is not to say that the Department's trial lawyers crossed any ethical line in defending the statute. They believed in good faith that arguments could be made. But the Solicitor General, reconsidering the matter in light of the district court's analysis, concluded that he could not continue to advocate the statute's constitutionality. The Attorney General so advised Congress, which subsequently amended the statute.<sup>29</sup>

On rare occasion the President may sign, and even execute, a law he considers to be unconstitutional. When that happens, the Solicitor General is in an odd position. In *Oregon v. Mitchell*,<sup>30</sup> for example, Solicitor General Erwin Griswold had to determine whether to defend a provision of the Voting Rights Act<sup>31</sup> that lowered the voting age to eighteen in state and local elections.<sup>32</sup> President Nixon strongly favored lowering the voting age, but as his signing statement reflected, he "believe[d]—along with most of the Nation's leading constitutional scholars—that Congress has no power to enact [the eighteen-year old voting age] by simple statute."<sup>33</sup> Griswold concluded that reasonable arguments could be made for the statute's constitutionality, and he defended the voting age provision in the Supreme Court accordingly. He began his oral argument, however,

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28. *Id.* at 1487.

29. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4454, 111 Stat. 251, 426–32 (codified in scattered sections of 42 U.S.C.) (replacing religious sect references in the Medicare and Medicaid Acts with sect-neutral accommodations for persons relying on a religious healing method or for whom receiving medical treatment is inconsistent with their religious beliefs). The amended statute was promptly challenged by the same plaintiffs and is currently in litigation. *See Children's Health Care is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1084 (8th Cir. 2000) (affirming the district court's decision upholding section 4454 of the Medicare and Medicaid Acts), *cert. denied sub nom. Children's Healthcare is a Legal Duty, Inc. v. McMullan*, 121 S. Ct. 1483 (2001).

30. 400 U.S. 112 (1970).

31. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified at 42 U.S.C. § 1973 (1994)).

32. *Mitchell*, 400 U.S. at 117.

33. Richard M. Nixon, Statement on Signing the Voting Rights Act of 1970, 1970 PUB. PAPERS 512 (June 22, 1970). The President was supported in this view by the testimony of two senior Department of Justice officials—Deputy Attorney General Richard Kleindienst and Assistant Attorney General William Rehnquist. *See Representation of Congress and Congressional Interests In Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong. 351 (1975) (statement of Erwin N. Griswold, Solicitor General of the United States) (Sup. Docs. No. Y4, J 89/2: C 76/23) [hereinafter *Representation Hearings*].

by informing the Court of the views of the President and of the Department of Justice questioning the statute's constitutionality and urged the Court to "give consideration to these views."<sup>34</sup> In a close vote, the Court struck down the law. Griswold's approach was lauded by some as admirable candor; it was attacked by others as half-hearted advocacy.<sup>35</sup>

*Buckley v. Valeo*<sup>36</sup>—the Court's landmark decision on campaign finance regulation—cast Solicitor General Griswold's successor in an even more unusual posture. In that case, Solicitor General Robert Bork and Attorney General Edward Levi filed an eighty-five page brief in the Supreme Court on behalf of the Attorney General and the Federal Election Commission as parties.<sup>37</sup> The brief elegantly put forward the best First Amendment defense of the contribution and expenditure limitations of the Federal Election Campaign Act.<sup>38</sup> Simultaneously, however, the Attorney General and Solicitor General filed a separate brief, also persuasive, on behalf of the Attorney General as appellee and the United States as amicus curiae, presenting a different, ninety-five page discussion of the First Amendment issues in a manner that "attempt[ed] to assist in analysis

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34. *Representation Hearings*, *supra* note 33, at 351 (statement of Erwin N. Griswold, Solicitor General of the United States).

35. *See, e.g.*, 123 CONG. REC. 2974 (1977) (remarks of Sen. James Abourezk criticizing the Solicitor General's defense as "lackluster and unenthusiastic").

On another occasion, the Solicitor General's defense of an Act of Congress was also markedly less than enthusiastic. In *Miles v. Graham*, the Court invalidated, under the Compensation Clause, U.S. CONST. art. III, § 1, Congress's attempt to extend application of the federal income tax to the salaries of federal judges (even judges who had taken office after enactment of the tax). 268 U.S. 501, 509 (1925), *overruled by* *O'Malley v. Woodrough*, 307 U.S. 277, 283 (1939). In defending the constitutionality of the tax, Solicitor General James M. Beck closed his brief with the following conclusion:

The Solicitor General takes no satisfaction in presenting this argument for the consideration of the court. He recognizes the painful inadequacy of the salaries of the Federal Judiciary. It would be a satisfaction to argue that this meager compensation, to which there is no comparison in any other great and wealthy nation, should not be diminished by an income tax.

Congress, however, has shown its unmistakable intention to subject these inadequate salaries to a tax. As able counsel have and will argue the invalidity of the tax, it is fair to Congress—and, indeed, it is fair to this court—that the other view of constitutional power should be fully and fairly presented, and this I have endeavored to do.

Brief for the United States at 28, *Miles v. Graham*, 268 U.S. 501 (1925) (No. 53). Fourteen years later the Court overruled *Miles*. *O'Malley*, 307 U.S. at 283.

36. 424 U.S. 1 (1976).

37. Brief for the Attorney General and the FEC at 37, *Buckley v. Valeo*, 424 U.S. 1 (1976) (No. 75-436).

38. 2 U.S.C. §§ 431-456 (1994 & Supp. IV 1998).

without pointing the way to particular conclusions.”<sup>39</sup>

Defending this unusual dual filing, Solicitor General Bork emphasized that the standing of 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 behave less like pure advocates than do lawyers for private interests. . . . [I]t would seem to me not only institutionally unnecessary but a betrayal of profound obligations to the Court and to Constitutional processes to take the simplistic position that whatever Congress enacts we will defend, entirely as advocates for the client and without an attempt to present the issues in the round.<sup>40</sup>

As was the case with Erwin Griswold in *Oregon v. Mitchell*, Judge Bork’s approach presented a vision of the Solicitor General’s role considered laudable by some, deplorable by others, but thought-provoking, I believe, to all.<sup>41</sup>

I mentioned earlier that there are two important categorical exceptions to the practice of defending any Act for which reasonable arguments can be made. I will address these exceptions in a moment, but first I want to point out that even when neither exception applies, the Department of Justice has occasionally declined to make professionally respectable arguments, even when available, to defend a statute—typically, in cases in which it is manifest that the President has concluded that the statute is unconstitutional.

In 1990, for example, the United States filed an amicus brief in *Metro Broadcasting v. FCC*<sup>42</sup> not defending but *challenging* the constitutionality of statutory provisions prohibiting the Federal Communications Commission (FCC) from diluting its regulatory preferences for minority-owned stations.<sup>43</sup> Notwithstanding the United States’ advocacy, the Court upheld the constitutionality of the

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39. Brief of Amici Attorney General as Appellee and for the United States at 8, *Buckley v. Valeo*, 424 U.S. 1 (1976) (No. 75-436).

40. Letter from Robert H. Bork, Solicitor General, to Simon Lazarus III (Aug. 5, 1975), reprinted in *Representation Hearings*, *supra* note 33, at 500–01.

41. For criticism, see, for example, *Representation Hearings*, *supra* note 33, at 150, 499–02, 747–49 (documenting letters, testimony, and an editorial submitted by Simon Lazarus III). The *Representation Hearings* also include Solicitor General Bork’s spirited defense of his practice. *Id.*

42. 497 U.S. 547 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

43. *Id.* at 551 (upholding sections of the Communications Act of 1934, 47 U.S.C. §§ 151, 301, 303, 307, 309, which allowed minority preference policies).

preferences,<sup>44</sup> although it later retreated from this decision.<sup>45</sup>

Similarly, in *Turner Broadcasting System, Inc. v. FCC*,<sup>46</sup> cable operators challenged the constitutionality of the "must-carry" provisions of the Cable Television Act of 1992.<sup>47</sup> That law was enacted over the veto of President Bush, who considered the provisions unconstitutional.<sup>48</sup> When the FCC implemented the provisions, the Department of Justice informed the district court that it would not defend their constitutionality, "consistent with President Bush's veto message."<sup>49</sup> President Clinton was then elected, and he concluded that the provisions *should* be defended.<sup>50</sup> The Justice Department then did so, and the Supreme Court upheld the law.<sup>51</sup>

Let me turn, finally, to the two recognized exceptions to the "reasonable argument" presumption. Both exceptions derive directly from the Solicitor General's duty to account for the interests of all three branches of government.

The first exception applies when an Act of Congress raises separation of powers concerns. It is not surprising that the President and Congress occasionally find themselves at odds regarding the proper interpretation of their own, and each other's, constitutional powers. In that event, the Solicitor General ordinarily defends the President's powers and prerogatives, and Congress traditionally appears as amicus to present its own views.

The best-known example is *INS v. Chadha*,<sup>52</sup> in which the Department of Justice declined to defend the constitutionality of the one-House veto.<sup>53</sup> The Solicitor General first exercised this

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44. *Id.* at 600.

45. *See Adarand*, 515 U.S. at 227.

46. 512 U.S. 622 (1994).

47. Cable Television Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.); *Turner Broad.*, 512 U.S. at 634.

48. S. DOC. NO. 102-29 (Sup. Docs. No. Y1.1/3:102-29).

49. Defendant's Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in this Case and its Related Cases at 2, *Turner Broad. Sys., Inc. v. FCC*, 810 F. Supp. 1308 (D.D.C. 1992) (No. 92-2247); *see also id.* at 4.

50. *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 38 (D.D.C. 1993) (referring to the "federal defendants' cross-motion to dismiss" the constitutional challenge).

51. *Turner Broad.*, 512 U.S. at 668.

52. 462 U.S. 919 (1983).

53. *Id.* at 926. In *Chadha*, the Solicitor General, representing the Immigration and Naturalization Service (INS), challenged the constitutionality of a provision that authorized either House of Congress, by resolution, to invalidate a decision of the Executive Branch regarding whether a particular deportable alien could remain in the United States. *Id.* When the Department of Justice announced that it would not defend the provision, the House and Senate intervened, and their counsel argued, unsuccessfully, for the constitutionality of the Act. *Id.* at 959.

prerogative, however, in 1926, in *Myers v. United States*.<sup>54</sup> *Myers* involved a statute that limited the President's power to remove postmasters.<sup>55</sup> The United States sided with Postmaster Myers and successfully challenged the statute.<sup>56</sup> The Court appointed Senator George Wharton Pepper to defend the judgment below in favor of the United States.<sup>57</sup> When the postmaster's lawyer rose to begin the oral argument in the case, he stated:

In the 136 years that have passed since the Constitution was adopted, there has come before this Court for the first time, so far as I am able to determine, a case in which the Government, through the Department of Justice, questions the constitutionality of its own act. As to that, I have no criticism to offer; I think it is but proper. We find the Solicitor General appearing as a representative of the Executive Department of the Government. And we have Senator Pepper, as *amicus curiae*, who . . . represents . . . the Legislative branch[] of the Government. I appear as counsel for the appellant, who brought this suit in the first instance. It is gratifying to feel that all interests are properly represented.<sup>58</sup>

The second exception to the general principle of defending Acts of Congress—an exception that assumes great significance in light of the Supreme Court's recent jurisprudence—arises when defending the statute would require the Solicitor General to ask the Supreme Court to overrule one of its constitutional precedents.<sup>59</sup> In that instance—when a contrary constitutional ruling is directly on point—the interests of the legislative and judicial branches are in direct tension. On the one hand, Congress has made a constitutional judgment. Yet under *Marbury v. Madison*,<sup>60</sup> the Supreme Court has the final word on the meaning of the Constitution.<sup>61</sup> The Solicitor General has an obligation to honor the important doctrine of stare

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54. 272 U.S. 52 (1926).

55. *Id.* at 56.

56. *Id.* at 176.

57. *Id.* at 56.

58. *Id.* at 57.

59. See, e.g., *Nomination of Seth Waxman to be Solicitor General, Hearings Before the Senate Comm. on the Judiciary*, 105th Cong. 7 (1997) (statement of Seth Waxman); *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. O.L.C. 13, 26 (1982) (The Department of Justice will not necessarily defend a statute where "prior precedent overwhelmingly indicates that the statute is invalid.").

60. 5 U.S. (1 Cranch) 137 (1803).

61. *Id.* at 177.

decisis and a duty to respect the rulings of the Court. Those responsibilities are at least commensurate with the Solicitor General's duty to respect congressional determinations about a statute's constitutionality.

Most commonly, cases falling under this exception involve statutes whose constitutionality has been undermined by Supreme Court decisions rendered *after* the law's enactment.<sup>62</sup> Congress, after all, rarely defies a Supreme Court ruling. For example, in recognition of the Court's new jurisprudence, the Department of Justice recently notified Congress twelve times during a single year that, in light of intervening judicial precedents, it could no longer defend a statutory provision that the legislature and the Executive might have considered constitutional at the time of enactment. Two terms ago, for example, in *Greater New Orleans Broadcasting Ass'n v. United States*,<sup>63</sup> the Court struck down a longstanding federal prohibition against casino advertising by broadcasters located in states that permit casino gambling.<sup>64</sup> Formally, the Court did not resolve whether the prohibition could still be applied to advertisements that originate in states that do not permit such gambling.<sup>65</sup> But after reviewing the opinion, I concluded that the Court's reasoning could not sustain such a distinction. We advised Congress that we could no longer defend the constitutionality of the prohibition anywhere.<sup>66</sup>

Similarly, in a case called *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>67</sup> the Court held that Congress lacks the power to abrogate the states' sovereign immunity against private damage awards for violation of the federal patent laws.<sup>68</sup> Other cases pending around the country involved a

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62. See, e.g., Letter from Janet Reno, Attorney General, to Albert Gore, Jr., President of the Senate (Oct. 13, 1999) (on file with the North Carolina Law Review) (explaining that the Department of Justice would withdraw from the litigation defending the abrogation of state immunity from a copyright violation suit in light of recent Supreme Court decisions upholding state immunity in similar suits); Letter from Seth P. Waxman, Solicitor General, to Albert Gore, Jr., President of the Senate (Aug. 6, 1999) (on file with the North Carolina Law Review) (explaining that the Department of Justice could no longer defend legislation barring truthful gambling advertising in the wake of a Supreme Court decision permitting lottery advertising by stations in states where such gambling was legal).

63. 527 U.S. 173 (1999).

64. *Id.* at 175-76.

65. *Id.* at 194.

66. Letter from Seth P. Waxman, Solicitor General, to Albert Gore, Jr., President of the Senate (Aug. 6, 1999).

67. 527 U.S. 627 (1999).

68. *Id.* at 647.

similar abrogation provision in the copyright law.<sup>69</sup> A footnote in Justice Stevens's dissenting opinion suggested that the Court's rationale in the patent context might not inexorably apply in the copyright context.<sup>70</sup> That suggestion inspired me to the limits of my creative faculties. But after exhaustively considering the matter, I simply could not find an appropriate argument consistent with the Court's reasoning in the patent case. Our letter to Congress did leave open the possibility of defending similar provisions if enacted after further congressional inquiry and findings.<sup>71</sup>

I do not mean to suggest that a Solicitor General may never ask the Court to reconsider constitutional precedent. Although the long-range interests of the United States caution extreme restraint, the Solicitor General, like any litigant, can always ask the Court to overrule a precedent. In 1950, for example, Solicitor General Philip Perlman asked the Court to overrule *Plessy v. Ferguson*.<sup>72</sup> Similarly, four years ago, in *Agostini v. Felton*,<sup>73</sup> the Solicitor General asked the Court to overrule an Establishment Clause holding it had rendered over a decade earlier in the very same case.<sup>74</sup> These are isolated exceptions, however, that prove the general rule.

And that brings me back to where I began—*Dickerson v. United States*.<sup>75</sup> As we told Speaker Hastert in response to his letter, the decision not to defend a statute, and indeed to advocate against it, should be a rare and solemn act.<sup>76</sup> But as we saw it, the Supreme Court's repeated, consistent application of *Miranda* to the States could only mean that the doctrine is a constitutional one; and because

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69. See, e.g., *Chavez v. Arte Publico Press*, 157 F.3d 282 (5th Cir. 1998) (striking down provisions of the Copyright Act seeking to abrogate state sovereign immunity).

70. *Florida Prepaid*, 527 U.S. at 658 n.9 (Stevens, J., dissenting).

71. Letter from Janet Reno, Attorney General, to Albert Gore, Jr., President of the Senate (Oct. 13, 1999) (on file with the North Carolina Law Review).

72. 163 U.S. 537 (1896) (holding that the Constitution permitted separate railway cars for black and white passengers). The United States first urged that *Plessy* be overruled in *Henderson v. United States*, 339 U.S. 816, 823 (1950). See Brief for the United States at 12, 23–66, *Henderson* (No. 25). For a general account of this decision, see Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1306–08 (2000).

73. 521 U.S. 203 (1997).

74. *Id.* at 203. The earlier case was styled *Aguilar v. Felton*, 473 U.S. 402 (1985). For a description of the unique procedural history of *Agostini*—in which, in response to a motion filed by under Rule 60(b)(5) of the Federal Rules of Civil Procedure, the Court reexamined its earlier judgment in the very same case—see Brief for the United States at 6–8, *Agostini v. Felton*, 521 U.S. 203 (1997) (No. 96-552).

75. 530 U.S. 428 (2000).

76. Letter from Janet Reno, Attorney General, to Dennis P. Hastert, Speaker of the House of Representatives (Mar. 17, 2000) (on file with the North Carolina Law Review).



the statute in question could not be reconciled with *Miranda*, it could constitutionally be applied only if the Court were to overrule *Miranda* and the dozens of cases that have followed, applied, and extended the landmark decision.<sup>77</sup> Taking into account all of the factors informing the doctrine of stare decisis, and all of the interests of the United States, neither the Attorney General nor I could conclude that *Miranda* should be overruled. We discussed our conclusion with the President, and he agreed.

Our decision was vociferously criticized by some. But our briefs in the Supreme Court presented the arguments on both sides of the issue and explained the basis for our conclusion.<sup>78</sup> I tried as hard as I could to file a brief that best reflected the long-range interest of the United States, as a government and as a people. Certain Members of Congress filed amicus briefs, as did many other interested parties, and all perspectives on the question were thoroughly joined and presented to the Supreme Court. The Court agreed with the position of the United States in an opinion authored by the Chief Justice and joined by six of his colleagues.<sup>79</sup>

Any decision not to defend the constitutionality of an Act of Congress tests the mettle of the Solicitor General. That is as it should be. Confronting issues of such moment, I took instruction and solace from Francis Biddle, who observed, following his own tenure in office that, so long as the Solicitor General maintains fidelity to the rule of law, he "has no master to serve except his country."<sup>80</sup> This country is quite a master. And what a privilege it was to be its servant.

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77. When the statute in question was enacted in 1968, the ninetieth Congress acknowledged that it was inconsistent with governing Supreme Court precedent; indeed, Congress's disagreement with the Court's constitutional view was the very reason for the statute's enactment. See Brief for the United States at 18–20, *United States v. Dickerson*, 530 U.S. 428 (2000) (No. 99-5525) (citing legislative references). The only recent analogy is the federal Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (1994)), enacted in the wake of *Texas v. Johnson*, 491 U.S. 397 (1989), which the Court invalidated in *United States v. Eichman*, 496 U.S. 310, 319 (1990).

78. See Brief for the United States at 11–50, *Dickerson* (No. 99-5525).

79. *Dickerson*, 530 U.S. at 432 (2000).

80. BIDDLE, *supra* note 13, at 98.