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POLITICS AND PRINCIPLE: AN ALTERNATIVE TAKE ON SETH P. WAXMAN'S *DEFENDING CONGRESS*

NEAL DEVINS*

Two years ago, the *North Carolina Law Review* published *Defending Congress*, an important essay by Clinton administration Solicitor General Seth Waxman.¹ In explaining why the Clinton administration defended most but not all federal statutes, Solicitor General Waxman argued that principle, not politics or ideology, drove his decisionmaking. In the pages that follow, I will take issue with Waxman's characterization of Clinton-era decisionmaking—especially the administration's decision to defend the Communications Decency Act of 1996 (“CDA”)² but not 1968 legislation overriding *Miranda v. Arizona*.³ In so doing, I will call attention to how Waxman's neutral-sounding standard—that the Solicitor General should defend laws whenever it is possible to advance a “professionally respectable” argument that does not require overruling constitutional precedent⁴—is susceptible to

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1. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001).

2. Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223(a), (d)–(h) (2000)) (criminally prohibiting use of the Internet to make “indecent” or “patently offensive” material available to minors). The Supreme Court invalidated the statute in *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

3. 384 U.S. 436 (1966); see 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 (2000)) (substituting a “totality of the circumstances” test for so-called *Miranda* warnings). The Supreme Court struck down this law in *Dickerson v. United States*, 530 U.S. 428 (2000). For additional discussion, see *infra* notes 19–25 and accompanying text.

4. Waxman, *supra* note 1, at 1078, 1085. Waxman, however, would not have this principle apply in separation of powers cases where Congress and the President “find themselves at odds regarding the proper interpretation of their own, and each other's, constitutional powers.” *Id.* at 1084. This exception (which I will not assess in this Essay)

political or ideological manipulation. Correspondingly, I will explain why Waxman had little incentive to defend Clinton-era decisionmaking as an appropriate exercise of his and/or the President's power to independently interpret the Constitution. In particular, such an explanation would neither preserve the Solicitor General's status as a quasi-independent actor nor allow Waxman to simultaneously explain both the soundness of his decisionmaking and the wrongness of a successor Solicitor General (make that Ted Olson) refusing to defend federal statutes that implicate Congress's power to regulate interstate commerce, campaign finance, affirmative action, and the like.⁵ At the same time, I do not mean to suggest that *Defending Congress* is a post hoc rationalization of politicized decisionmaking. My aim, instead, is to call attention to how both politics and personal belief stand in the way of *any* Solicitor General implementing a predictable, neutral-sounding theory of when he will and will not defend acts of Congress.

Before turning to the particulars of Waxman's essay, I think it useful to articulate my understanding of the President's power to interpret the Constitution. First and foremost, our tripartite system of government assumes that the executive is independent from, not subordinate to, Congress and the courts. To maintain that independence, a President must be able to decide for himself what the Constitution means. By taking an oath to "faithfully execute" his office and to "preserve, protect, and defend" the Constitution,⁶ a President affirms that he will not act in violation of the Constitution—even if that means refusing to defend the constitutionality of legislation. For that very reason, the Clinton administration was under no duty to enforce or defend *Miranda* override legislation.⁷

adheres to longstanding Justice Department practice. See generally Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Office of Legal Couns. 199 (1994) (discussing the President's constitutional authority to decline to execute unconstitutional statutes).

5. See *infra* notes 41–42 and accompanying text (discussing Waxman's call for the Bush administration to defend Congress's Commerce Clause power).

6. U.S. CONST. art. II, § 1.

7. For a more detailed presentation of this argument, see Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering Miranda*, 149 U. PA. L. REV. 251, 270–74 (2000). For scholarship addressing the President's power to interpret the Constitution, see Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). For a competing perspective, see Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Executive Abuse*, 63 B.U. L. REV. 59, 90 (1983) (arguing that

In saying that a President need not defend or execute a law he thinks unconstitutional, I am not suggesting that the President is not bound by the rule of law. Like Waxman, I think that the Solicitor General has a “responsibility to account for the interests of all three branches of government.”⁸ For example, a President cannot place himself above the Court by refusing to execute a judicial order, even if he thinks the order is constitutionally infirm. Moreover, to allow each branch to check the others, presidents—whenever possible—should enforce constitutionally suspect legislation in order to set the stage for a court challenge.⁹

The question remains: *Should* Solicitor General filings before the Supreme Court reflect the President’s understanding of the Constitution? In answering this question, Waxman contends that the Solicitor General must maintain fidelity, not to the President, but to the “rule of law” and, with it, the Supreme Court’s “history of judicial review.”¹⁰ Contending that “the Supreme Court has the final word on the meaning of the Constitution,” Waxman argues that the best way to “honor the important doctrine of stare decisis” is to fence out cases in which the Court would have to overrule one of its precedents from the Solicitor General’s normal practice of “[v]igorously defending congressional legislation.”¹¹

In explaining the workings of this model, Waxman draws a distinction between his defense of the CDA and his refusal to defend *Miranda* override legislation. The CDA case, as Waxman recognizes, was a sure loser.¹² Congress, “without hearings or committee

“faithful execution” does not include the President’s power to refuse to implement statutes he thinks unconstitutional).

8. Waxman, *supra* note 1, at 1078.

9. Unlike Waxman, I think that the Article III case or controversy requirement may foreclose the executive from making arguments identical to the arguments made by the party challenging executive branch enforcement. See Devins, *supra* note 7, at 277–79. As such, presidents may not be able to enforce a law while arguing that it is unconstitutional. For a general treatment of this issue, see Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7.

10. Waxman, *supra* note 1, at 1088, 1078.

11. *Id.* at 1085–86, 1078. Waxman also argues that, by defending the constitutionality of federal laws, the Solicitor General gives “proper respect . . . to Congress’s policy choices.” *Id.* at 1078. Yet, by refusing to defend in some cases (even when “professionally responsible” arguments can be made), it is clear that Waxman’s principal allegiance is to the Supreme Court (or at least Supreme Court precedent). For additional discussion, see *infra* notes 16–21 and accompanying text.

12. In addition to comments made in *Defending Congress*, Waxman had earlier described the CDA as too much of “a blunt instrument” and *Reno v. ACLU* as “an easy case.” Nadine Strossen, *Foreword*, 15 N.Y.L. SCH. J. HUM. RTS. i, viii–ix & n.23 (1998)

consideration,” imposed criminal penalties on “indecent” or “patently offensive” speech available to children on the Internet.¹³ All six lower court judges that had ruled on the CDA found the law facially unconstitutional “in every respect.”¹⁴ Consequently, while the CDA is “an example some people chuckle to recall,” Waxman sees it as an exemplar of the Solicitor General’s serving “our adversarial system of constitutional adjudication” by articulating the “strongest possible rationale in support of [the] constitutionality” of legislation.¹⁵ In explaining his decision not to defend *Miranda* override legislation, Waxman invokes another ideal: namely, his “obligation to honor” *stare decisis*.¹⁶ Contending that “the statute in question could not be reconciled with *Miranda*, it could constitutionally be applied only if the Court were to overrule *Miranda*,” Waxman saw his refusal to defend this statute as a way of maintaining “fidelity to the rule of law.”¹⁷

Upon closer examination, however, there is reason to question this narrative. To start, Waxman overstates matters when arguing that the only way he could have defended *Miranda* override legislation was to ask the Justices to explicitly overrule their “landmark” “constitutional” decision in *Miranda*.¹⁸ When upholding *Miranda* override statute, for example, the United States Court of Appeals for the Fourth Circuit concluded that *Miranda* created nonconstitutional, prophylactic rules, and, consequently, Congress could override the decision without compelling the Court to overturn a constitutional ruling.¹⁹ Likewise, the attorney defending the statute before the Court as well as the House General Counsel and a coalition of Senators who filed amicus briefs in the case all argued that the *Miranda* rules were not mandated by the Constitution.²⁰ In

(discussing why “as President of the ACLU” she was “perturbed about the squandering of our government’s resources” in the defense of a law that the Justice Department thought “‘obviously unconstitutional’”) (internal quotation omitted).

13. Waxman, *supra* note 1, at 1079 (citing 47 U.S.C. § 223(d)(1)(B) (2000)) (internal quotation omitted).

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

15. *Id.*

16. *Id.* at 1085.

17. *Id.* at 1088.

18. *Id.* at 1087–88.

19. *United States v. Dickerson*, 166 F.3d 667, 684–92 (4th Cir. 1999), *rev’d*, 530 U.S. 428 (2000).

20. See Brief of Court-Appointed Amicus Curiae Urging Affirmance of the Judgment Below at 5, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525); Brief *Amicus Curiae* of the Bipartisan Legal Advisory Group of the United States House of

short, it appears as if a “professionally responsible” argument defending the statute could have been made without calling upon the Court to “overturn” one of its precedents.²¹ That argument would have contended that prophylactic rules are not constitutional in stature and, consequently, Congress is free to modify them, as it is free to modify rules of federal common law.

That, of course, does not mean that that argument is either the correct reading of *Miranda* or the Constitution.²² It does suggest, however, that the decision not to defend the statute is best explained by Waxman’s views of the Constitution’s right against self-incrimination and/or *Miranda*. Indeed, in his certiorari petition before the Court, Waxman argued that *Miranda* “promotes public confidence that the criminal justice system is fair” and that “[s]teps that may damage that confidence should not be taken lightly.”²³ Along these lines, there is reason to speculate that Waxman thought the costs of the Solicitor General’s backing Congress were too high. In particular, when the Supreme Court agreed to hear the *Miranda* override case, the *New York Times* and *Legal Times* spoke of *Miranda* as “not without ambiguity” and predicted that “the decision is likely to be close.”²⁴ Consequently, rather than find himself an important player in the undoing of *Miranda*, Waxman may have

Representatives in Support of Affirmance at 15, *Dickerson* (No. 99-5525); Brief Amicus Curiae of Senators Orrin G. Hatch et al. Urging Affirmation at 6, *Dickerson* (No. 99-5525). On the other side (arguing that the statute could be sustained only if *Miranda* was overruled), a brief written by Charles Tiefer and filed by the House Democratic Leadership advanced arguments similar to those advanced in Waxman’s brief for the United States. See Brief Amicus Curiae of the House Democratic Leadership in Support of Petitioner at 22, *Dickerson* (No. 99-5525). For additional discussion, see *infra* notes 21–25 and accompanying text.

21. Indeed, Waxman’s decision not to defend appears at odds with his claim that the Solicitor General, in order to defend a constitutionally suspect act of Congress, often “lean[s] heavily on the *Ashwander* principle of construing a statute so as to avoid constitutional doubt.” Waxman, *supra* note 1, at 1079–80 (citing *Ashwander v. TVA*, 297 U.S. 288, 348 (1936)).

22. Along these lines, it is possible that Waxman would have defended a statute that embraced a different view of the *Miranda* decision. For example, it is possible that Waxman would have defended a statute specifying that the remedy for a violation of *Miranda* should be money damages (not the exclusion of evidence). That type of statute would not have questioned whether the Court’s comments about the inherently coercive nature of custodial interrogations were, ultimately, a proposition of constitutional law. Thanks to Tom Merrill for pointing this out to me.

23. Brief for the United States at 36, *Dickerson* (No. 99-5525).

24. Linda Greenhouse, *Justices to Hear Case that Tests Miranda Decision*, N.Y. TIMES, Dec. 7, 1999, at A1; Tony Mauro, *Justices Debate Miranda*, LEGAL TIMES, Apr. 24, 2000, at 9.

thought it best to try to undo Congress's handiwork by advancing his views about *Miranda*.²⁵

Waxman's defense of the CDA can also be recast.²⁶ Rather than exemplifying the Solicitor General's willingness to defend constitutionally suspect legislation, the CDA defense may be tied to *United States v. Knox*,²⁷ a political debacle involving first term Clinton Solicitor General Drew Days. *Knox* raised the issue of whether a 1984 child pornography law applied to photographs of young girls dressed in scanty apparel.²⁸ The (first) Bush administration had successfully argued that the law did apply to such photos. But after the U.S. Supreme Court agreed to hear the case, Solicitor General Days "confessed error" and, in so doing, joined forces with the American Civil Liberties Union in arguing that the Bush interpretation was incorrect. Shortly thereafter, the Supreme Court remanded *Knox* to the Third Circuit and, as Solicitor General Days put it, "all hell broke loose."²⁹ All one hundred senators voted for a resolution condemning the Solicitor General's brief, and a 1994 crime bill included a section expressing Congress's sense that the 1984 law, in fact, did apply to children wearing scanty apparel.³⁰ For his part, the President released a letter to Attorney General Reno agreeing with "the Senate about what the proper scope of the child pornography law should be."³¹ And finally, when the *Knox* case returned to the Supreme Court, the Clinton Department of Justice (in a brief signed by Attorney General Reno) shifted its position and argued in favor of a broad interpretation of the 1984 law.³²

25. President Clinton backed Waxman's decision not to defend the *Miranda* override statute. See Tony Mauro, *Seth Waxman's Supreme Confidence*, LEGAL TIMES, Oct. 23, 2000, at 12, 14 (describing the White House meeting between President Clinton, Attorney General Reno, and Solicitor General Waxman).

26. Technically, the decision to defend the CDA was made by then-Acting Solicitor General Walter Dellinger. Waxman, however, did argue the case before the Court and refers to that argument in *Defending Congress*. See Waxman, *supra* note 1, at 1079.

27. 776 F. Supp. 174 (M.D. Pa. 1991), *aff'd*, 977 F.2d 815 (3d Cir. 1992), *dismissed, vacated, and remanded*, 510 U.S. 939 (1993).

28. *Knox*, 766 F. Supp. at 179-80.

29. Drew S. Days, III, *When the President Says "No": A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509, 515 (2001) (internal quotation omitted).

30. See 139 CONG. REC. 29,568-70 (1993) (statements of Sen. Roth and Sen. Grassley); Linda Greenhouse, *Court Rejects Appeal of Man Convicted in Child Smut Case With Political Overtones*, N.Y. TIMES, Jan. 18, 1995, at D20.

31. Stuart Taylor, Jr., *Demagoging Kidporn: Justice Gets Bad Rap*, LEGAL TIMES, Nov. 29, 1993, at 26 (quoting the Clinton letter).

32. See Pierre Thomas, *Reno Takes Tougher Stance on Child Pornography*, WASH. POST, Nov. 11, 1994, at A3.

Against this backdrop, it is little wonder that Waxman might have had no taste for a starring role in “Son of *Knox*.” Moreover, unlike *Miranda* override legislation, there was little prospect of a Solicitor General brief and oral argument supporting the CDA materially affecting the outcome of the litigation. I do not mean to suggest here that the *only* reason Waxman defended the CDA was because he feared political backlash.³³ At the same time, the standard he articulates is easily manipulable. For another Solicitor General, *Miranda* override legislation could have been defended without calling for the outright reversal of *Miranda*. Likewise, the CDA was seen as a sure loser because the Court would have had to overrule or reinterpret past precedent to uphold the statute. And if that is the case, another Solicitor General could have concluded that the CDA could not be defended without asking the Court to overrule a constitutional precedent.³⁴

Indeed, Waxman concedes that it is sometimes permissible for the Solicitor General to ask the Court to overrule past precedent. But he never explains when that is appropriate. For example, if the Truman administration was right in calling for the overruling of *Plessy v. Ferguson*,³⁵ was the Reagan administration also correct in calling for the overruling of *Roe v. Wade*?³⁶ And if not, why not?³⁷

33. The Clinton Department of Justice may have hoped the Court would recalibrate its doctrine and uphold the CDA. Under this scenario, of course, Waxman would have strong incentive to launch a vigorous defense of the CDA.

34. Along these very lines, Waxman explained his predecessor’s decision not to defend federal legislation that gave special treatment to nursing services “‘operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts.’” Waxman, *supra* note 1, at 1080 (quoting 42 U.S.C. § 1395x(e) (1994)). In particular, even though the Civil Division had “fought valiantly in the district court” by trying to defend the statute as consistent with existing precedent, the Solicitor General thought that he “could not continue to advocate the statute’s constitutionality” without asking the Court to overturn Establishment Clause precedents. *Id.* at 1081.

35. 163 U.S. 537 (1896).

36. 410 U.S. 113 (1973). For a general treatment of the Reagan administration’s call for the Supreme Court to overturn *Roe*, see CHARLES FRIED, ORDER AND LAW 71–88 (1991).

37. Waxman never makes clear whether his embrace of *stare decisis* applies only to constitutional challenges to federal legislation or, alternatively, whether he thinks that the Solicitor General should not call for the overruling of earlier precedents. His essay, of course, is about the rules governing the defense of federal statutes. At the same time, his comments about *stare decisis* seem more generalizable. For example, Waxman refers to the Truman administration’s call for the overruling of *Plessy* (in a case that did not implicate a federal statute) to be the exception that “prove[s] the general rule” that the Solicitor General must exercise “extreme restraint” before calling for the overruling of constitutional precedent. Waxman, *supra* note 1, at 1087. Waxman, however, never squares this suggestion with his apparent embrace of a conflicting proposition—that is,

Moreover, what does it mean to say that the Solicitor General can only make “professionally responsible” arguments? Waxman never explains how he would draw the line separating a responsible argument from an irresponsible one.

From my vantage point, *Defending Congress* is better used to explain past decisionmaking than it is to predict future decisionmaking. This does not mean that Solicitor General Waxman placed his personal beliefs ahead of his stated commitment to the “rule of law”; instead, Waxman may have thought he was fairly applying the principles enunciated in *Defending Congress*.³⁸ Nevertheless, I cannot help but notice how Waxman’s essay is a template both for maintaining the power and prestige of the Solicitor General and for limiting the ability of future Solicitors General to advance the social conservative agenda by calling either for the overruling of disfavored precedents or the Court’s invalidation of disfavored federal statutes.

Let me explain. *First*, the 2000 elections were lurking in the background of *Defending Congress*, which was drawn from a September 15, 2000, address. At that time, Waxman was well aware of differences between “[s]trong conservatives” and “moderates and liberals” on, for example, “the federal-state balance.”³⁹ By contending that “the Solicitor General must be the steward and champion of Congress’s legislative judgments,”⁴⁰ Waxman suggests that it would be professionally irresponsible for the current administration to refuse to defend federal statutes by invoking states’ rights values.⁴¹ Moreover, by tying his proposal to the sanctity of the “rule of law” and, with it, *stare decisis*, Waxman did more than

that the President has the power to independently interpret the Constitution. *See id.* at 1078–79 n.14.

38. Consider, for example, Waxman’s October 13, 1999, refusal to defend an abrogation provision in federal copyright law. *See* 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). Here, Waxman’s decision can only be understood as a good faith effort to put into effect a 1999 Supreme Court ruling invalidating an analogous federal patent statute. In other words, in calling attention to how politics or ideology might play a role in the implementation of the model advanced by Solicitor General Waxman, I am not arguing that Waxman’s decisionmaking, in fact, was animated by politics or ideology. *See supra* p. 2062, *infra* p. 2072–73 (repeating this assertion).

39. Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1126 (2001) (adapted from remarks delivered on February 4, 2001).

40. *Id.*

41. Indeed, Waxman closed his February 4, 2001, address on whether “the Solicitor General matters” by remarking: “Let us watch very carefully how my successor answers those questions” on whether he will do his duty and place the national interest ahead of (what may well be) his personal beliefs. *Id.*

provide a rationale for his decision not to defend *Miranda* override legislation. He also sent a message that it would be wrong for the Bush administration to call for the overturning of Supreme Court decisions on abortion, school prayer, affirmative action, and the like.⁴²

Second (and far more important), *Defending Congress's* claims about the Solicitor General's "obligation to honor the important doctrine of stare decisis"⁴³ are not simply a benchmark that bootstraps the current administration; these claims also speak to the Solicitor General's quasi-independent status and, correspondingly, the wrongness of either Congress or the President seeking to influence Solicitor General decisionmaking. Likewise, without explicitly mentioning the controversy surrounding Reagan and (first) Bush-era Solicitors General conforming to administration policy and calling for the overruling of *Roe*, Waxman seems well aware of the benefits of insulating the Solicitor General from the hurly-burly of politics.⁴⁴

Political insulation, however, cannot be achieved with a stump speech describing the Solicitor General as a "serv[ant]" to "his country" whose responsibility is "to account for the interests of all three branches of government."⁴⁵ More to the point, Congress is likely to leave the Solicitor General alone so long as the Solicitor General is sensitive to Congress's needs.⁴⁶ By defending nearly all federal statutes, Solicitors General are able to both earn Congress's trust and protect their turf.⁴⁷

42. For additional discussion, see John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 811–12 (1992) (contending that lawyers who work in the Solicitor General's office are apt to embrace Warren Court liberalism).

43. Waxman, *supra* note 1, at 1085–86.

44. For an argument that the Solicitor General should represent the President's interests, see McGinnis, *supra* note 42. For an argument (quite similar to Waxman's) that the Solicitor General's duty is to the rule of law, see LINCOLN CAPLAN, *THE TENTH JUSTICE* (1987).

45. Waxman, *supra* note 1, at 1088, 1078.

46. Perhaps because counsel for the House and Senate stand ready to defend—on separation of powers grounds—the constitutionality of federal statutes, Congress is accepting of the Justice Department's refusal to defend statutes on separation of powers grounds. See Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, LAW & CONTEMP. PROBS., Spring 1998, at 47, 50–55. In making this point, I am not suggesting that federal courts ought to ignore Article III justiciability constraints in order to allow the President and Congress to advance conflicting constitutional interpretations. See Devins, *supra* note 7, at 277–79 (arguing that *INS v. Chadha*, 462 U.S. 919 (1983), was nonjusticiable for precisely this reason).

47. Solicitors General, moreover, must signal their willingness to defend federal statutes in order to secure Senate confirmation. This was true for Waxman and, more

In addition to these, Solicitor General-specific concerns, the President and the Attorney General too have strong incentives to work with Congress.⁴⁸ Congress can pressure the executive through any one of a number of techniques, including the power to confirm nominees; cut off funds to the Justice Department and other executive agencies; subject Justice Department officials to oversight hearings and other types of jawboning; and finally, shift litigation authority away from the Justice Department (and the concomitant power to shift government operations away from the executive and to independent agencies). Against this backdrop, it is little wonder that the President and Attorney General almost always want the Justice Department to defend the constitutionality of legislation. In particular, by accommodating Congress in this way, the President and Attorney General get something in return: peace—that is, lawmaker acquiescence to Justice Department control of litigation, especially Supreme Court litigation.⁴⁹

Consider, for example, the Clinton administration's flip-flop in the *Knox* litigation. Recognizing the costs of advancing a narrow definition of child pornography laws, the President and Attorney General disavowed Solicitor General Days's arguments and, in so doing, placated Congress.⁵⁰ Likewise, in *Metro Broadcasting v. FCC*,⁵¹ the (first) Bush administration took Congress's support of race preferences into account. Specifically, in an effort both to get the Senate to confirm his three picks for the Federal Communications Commission ("FCC") and to otherwise establish a good working relationship between the Commission and its congressional overseers, the President nominated Commissioners who supported diversity

recently, for Solicitor General Ted Olson. For example, in discussing campaign finance reform legislation, then-nominee Ted Olson remarked that "the fact that the President might have expressed some doubts doesn't alleviate the Justice Department from its responsibility to do everything it can within reason to defend the constitutionality of the statute." *Confirmation Hearing on the Nominations of Larry D. Thompson to be Deputy Attorney General and Theodore B. Olson to be Solicitor General of the United States, Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 127 (2001) (statement of Ted Olson) (Sup. Doc. No. Y4.J89/2:S.HRG.107-250).

48. A more detailed presentation of the argument laid out in this paragraph can be found in Neal Devins, *Defending Congress's Interests in Court: How Lawmakers and the President Bargain Over Department of Justice Representation*, 32 PRESIDENTIAL STUD. Q. 157, 160–65 (2002).

49. For an explanation of why the President supports the centralization of litigation authority in the Justice Department, see Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, LAW & CONTEMP. PROBS., Winter 1998, at 205, 219–20.

50. See *supra* notes 31–32 and accompanying text.

51. 497 U.S. 547 (1990).

preferences.⁵² Correspondingly, even though the administration thought these preferences were unconstitutional, the Solicitor General let the FCC defend their constitutionality before the Supreme Court (allowing the administration to attack the preference program as an amicus without risking the case's dismissal on mootness grounds).⁵³ In these and other ways, the President, Attorney General, and Solicitor General seek to maintain goodwill with Congress by accommodating lawmaker preferences.

What, then, of Solicitor General Waxman's decision not to defend *Miranda* override legislation? Here, the Solicitor General was well aware of Congress's interest in the statute. Oversight hearings had been held in 1995 and 1997; at that time, Solicitor General Days and Attorney General Reno were both asked about the Justice Department's willingness to utilize *Miranda* override legislation.⁵⁴ At the same time, the Clinton administration almost certainly knew that Democrats in Congress did not support the 1968 *Miranda* override legislation. House Democratic leadership, for example, filed a brief extolling *Miranda*'s "extraordinary history of acceptance and success in federal law enforcement" and otherwise calling for the reaffirmation of *Miranda*.⁵⁵ In other words, unlike the *Knox* litigation (where Congress spoke as one), *Miranda* override litigation required the Clinton administration to choose sides in a contested battle. It therefore is hardly surprising that the President, Attorney General, and Solicitor General would decide not to defend the constitutionality of *Miranda* override legislation.⁵⁶

52. See Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 152-53 & n.181 (1990).

53. For a more detailed discussion of the politics behind the *Metro Broadcasting* litigation, see Neal Devins, *Unitariness and Independence: Solicitor General Control of Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994).

54. See *Oversight of the Department of Justice: Hearing Before the Comm. on the Judiciary on Oversight on the Operations of the Department of Justice*, 105th Cong. 71-72 (2000) (questioning of Attorney General Reno by Senator Jeff Sessions (R-Ala.) on the *Miranda* override legislation) (Sup. Doc. No. Y4.J89/2:S.HRG105-1041); *Solicitor General Oversight: Hearing Before the Comm. on the Judiciary on Examining the Operation and Activities of the Office of the Solicitor General of the Department of Justice*, 104th Cong. 29-33 (1997) (Sup. Doc. No. Y4.J89/2:SHRG.104-818) (questioning of Solicitor General Days by Senator Fred Thompson (R-Tenn.) on the government's position regarding Congress's ability to make laws which override *Miranda*).

55. Brief Amicus Curiae of the House Democratic Leadership at 5, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525). While this brief was filed *after* the Clinton administration's decision, it seems likely that the administration knew that Democrats in Congress would support their decision.

56. See Mauro, *supra* note 24.

Likewise, it is not surprising that Waxman would pitch his decision not to defend *Miranda* override legislation as grounded in the Solicitor General's "obligation to honor" stare decisis and, with it, the rule of law.⁵⁷ From the standpoint of Solicitor General-Congress relations, this type of defense (which may well reflect Waxman's reading of *Miranda*) is less vulnerable to political attack than a defense grounded in the Solicitor General's understanding of presidential desires, good public policy, or even the Constitution's meaning. In particular, a defense grounded in stare decisis looks to what the Court thinks, not what the Solicitor General and/or President thinks. Correspondingly, such a defense communicates to Congress that the Solicitor General can still be looked to as a vigorous advocate of legislation, for he will not place his or the President's views ahead of Congress's.⁵⁸

From the standpoint of Solicitor General-White House relations, Waxman also had good reason to speak about his obligations to Congress and the Court. The Solicitor General's reputation for professionalism and independence is tied to the notion that his allegiances run outside of the executive branch to the Supreme Court and, more generally, to the rule of law. More to the point: The power of the Solicitor General is tied to his reputation for independence. Accordingly, the Solicitor General has little incentive to refuse to defend an act of Congress, especially when such a decision places his office on the sidelines and opens him up to charges of acting politically. Instead, by seeing himself both as an officer of the Court and an advocate for all parts of the government, the Solicitor General maximizes influence with both the Supreme Court and other parts of the government.

I do not mean to suggest that Waxman does not see the Solicitor General as a quasi-independent advocate; my suspicion is that Waxman truly believes what he says. I also suspect that Waxman finds his theory irresistible, in part, because it protects the independence of his office, provides a neutral-sounding justification for his decisionmaking in the *Miranda* override litigation, and can be

57. Waxman, *supra* note 1, at 1085, 1088.

58. Along these lines, Supreme Court Justices will interpret a decision to defend an act of Congress as a procedural decision grounded in respect for Congress's policymaking powers and the Court's authority to rule on the constitutionality of federal legislation. In contrast, Justices—assuming they buy Waxman's theory—will interpret a decision not to defend an act of Congress as a substantive evaluation that the Solicitor General could not utilize existing Supreme Court precedent to advance a "professionally responsible" argument.

used to attack social conservatives who want the Solicitor General to advance their agenda before the Supreme Court.⁵⁹ That this theory is also subject to political and ideological manipulation speaks to a larger point about whether the Solicitor General, in fact, can be bound by a predictable, neutral-sounding theory.

Whether or not he sees himself as a political actor, the Solicitor General must operate in a political world. By necessity, he must juggle numerous balls and otherwise engage in a complex balancing act. On high profile cases, the Solicitor General cannot help but notice Congress, the White House, agency heads, the Attorney General and division heads within the Department of Justice, careerist lawyers in his office, the press, legal academics, and other elites. More than that, the Solicitor General knows that his effectiveness may well be measured by his won-lost record before the Supreme Court—as well as his ability to insulate his office from direct political influence. Waxman is no doubt well aware of the difficulties of balancing competing interests and successfully advancing an agenda before the Supreme Court. In other writings, he effectively discusses how “context and advocacy” can and should affect Solicitor General decisionmaking.⁶⁰ Against this backdrop, there is little to commend a predictable monolithic theory.

Solicitor General Waxman, no doubt, understands this; *Defending Congress* advances a theory that at once sounds highly principled but nevertheless can be manipulated to accommodate political reality and personal belief. Indeed, although there is no

59. This suspicion is grounded in my belief that people of integrity often employ “motivated reasoning”—the notion that individuals will embrace reasoning “strategies” consistent with their “desire[s] or preferences.” Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 351–59 (2001) (quoting Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990)).

60. Waxman, *supra* note 39, at 1126 (discussing ongoing federalism litigation and noting that “we are at a delicate point in the Commerce Clause journey” which may be very much affected by the Solicitor General’s actions). Also, in a wonderful essay on Supreme Court advocacy, Waxman demonstrates his awareness of how politics and context impacted the Solicitor General’s defense of New Deal legislation. See Seth P. Waxman, *The Physics of Persuasion: Arguing the New Deal*, 88 GEO. L.J. 2399, 2399 (2000). For this very reason, Waxman argues that the Roosevelt administration should have focused its energies on the pursuit of winnable cases—even if that meant that the administration would not defend some of its regulatory schemes and (for some period of time) related congressional legislation. See *id.* at 2405–07 (discussing the wrongness of appealing *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617 (2d Cir. 1935), *rev’d*, 295 U.S. 495 (1935)). For a general treatment of how the Solicitor General uses his power to select cases to shape Supreme Court doctrine, see Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391 (2000).

reason to think that Waxman does not sincerely believe everything he says in *Defending Congress*, it is nevertheless striking that his argument simultaneously justifies his decisionmaking, protects the Office of Solicitor General from political attack, and furthers his desire to constrain Solicitor General Olson from advancing arguments he dislikes.⁶¹ For all these reasons, Waxman's argument should be greeted with awe as well as skepticism. And while this Essay has invested most of its energy in suggesting that there is reason to be skeptical when reading *Defending Congress*, Waxman deserves credit for writing a plausible and entertaining essay explicitly defending his tenure as Solicitor General and implicitly limiting the Bush administration in its efforts to use the Solicitor General's office to advance the social conservative agenda.⁶²

61. On this last point, see Waxman, *supra* note 39, at 1126 (noting that with regard to federalism, the Solicitor General acts as "the steward and champion of Congress's legislative judgments and [in] the long-term institutional interests of the national government").

62. More than two years after his confirmation as Solicitor General, Ted Olson has neither called for the overruling of any Supreme Court precedents nor declined to defend the constitutionality of any federal statute. This, of course, is not to say that Olson has not pursued any socially conservative causes. In May 2002, Olson informed the Supreme Court of his belief that the Second Amendment protects an individual's right to bear arms and therefore extends beyond militias. See Tony Mauro, *Warning Shots Foretold Gun Flip: Observers of SG Saw Internal Struggle*, LEGAL TIMES, May 13, 2002, at 8. More generally, in the wake of September 11, 2001, Solicitor General Olson has invested considerable energy in defending various Bush administration initiatives tied to the ongoing "War on Terror." See Neil A. Lewis, *Loss Shadows Solicitor General's Victories*, N.Y. TIMES, Aug. 4, 2002, at 18.