



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 98
Number 5 *Legal Ethics in the Age of Trump*

Article 7

6-1-2020

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Recommended Citation

F. A. Hessick, *Defending the Constitutionality of Federal Statutes*, 98 N.C. L. REV. 1185 (2020).

Available at: <https://scholarship.law.unc.edu/nclr/vol98/iss5/7>

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DEFENDING THE CONSTITUTIONALITY OF FEDERAL STATUTES*

F. ANDREW HESSICK**

When a federal statute faces constitutional challenges, the Department of Justice traditionally almost always has defended the constitutionality of that statute. Even if attorneys in the Department think the statute is unconstitutional, they will defend the statute so long as a reasonable argument can be made supporting the statute's constitutionality. Although one might think that the practice derives from ethical obligations, it does not. Instead, it rests on prudential considerations of maintaining a smooth relationship with Congress and ensuring that Congress and the courts each retain their respective roles of policymaker and adjudicator. When these prudential considerations no longer apply, we should expect to see the practice of defending statutes break down. We should expect to see the Executive push its own views more aggressively when litigating the constitutionality of federal statutes. This Essay discusses the possibility of the degradation of the Department of Justice's practice of defending the constitutionality of statutes through the recent example of the Department's aggressive stance challenging the Affordable Care Act in the Fifth Circuit, and it offers some thoughts on ways to provide for the defense of federal statutes in the future.

INTRODUCTION

Enacting legislation is the most important function of the United States government. Allocating the power to legislate and describing the process by which legislation is enacted are the first orders of business in the Constitution, and that legislation signifies the priorities and policies of the United States. To preserve these policies, the Department of Justice ("Department") has adopted a practice of protecting federal legislation from constitutional attack.¹ Typically, so long as a reasonable argument can be made supporting a statute's constitutionality, the Department will defend the statute. This practice

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** Judge John J. Parker Distinguished Professor of Law. Thanks to Carissa Hessick and the participants in the *North Carolina Law Review's* symposium on *Legal Ethics in the Age of Trump* for their helpful comments.

1. See, e.g., Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 *LAW & CONTEMP. PROBS.* 105, 126 (2004) ("Departments of Justice typically defend acts of Congress that in their view are unconstitutional, as long as a reasonable argument can [be] made in support of the law."); see also Seth P. Waxman, *Defending Congress*, 79 *N.C. L. REV.* 1073, 1078 (2001).

resonates with the ethical obligation of lawyers to press with diligence the interests of clients.² After all, the Department appears on behalf of the United States, and federal statutes are the laws of the United States.

But the practice does not, in fact, rest on the ethical obligation to advance the interests of the client. Instead, it is not always clear that defending the constitutionality of a statute is in the interests of the United States. Different branches of government, for instance, may disagree over the constitutionality of a statute.³

Instead of deriving from ethical obligations, the practice of defending the constitutionality of statutes rests largely on prudential considerations. Although the Department is part of the executive branch and accordingly owes allegiance to the President, it has defended statutes to preserve Congress's role as policymaker and the judiciary's role as adjudicator of the constitutionality of laws.⁴

But if prudential reasons provide the basis for the practice of defending statutes, we should expect to see the practice break down when those prudential considerations no longer apply. If the executive branch is no longer concerned with maintaining a smooth relationship with Congress, or preserving Congress's role as policymaker, or protecting the role of the court as adjudicator of constitutionality, it will more aggressively push its own views when litigating the constitutionality of federal statutes.

The Department's position in the recent challenge to the Affordable Care Act may be an example of this phenomenon.⁵ In that challenge, the Department argues not only that the individual mandate to buy insurance is unconstitutional but also that the rest of the Act must be struck down, despite not raising constitutional questions itself, because it is not severable from the individual mandate.⁶ It is hard to find other instances of the Department making such an aggressive attack on the constitutionality of a federal act. This aggressive stance may be ascribed in part to the increased polarization of political parties and the breakdown in relations between the Executive and Congress.

This Essay considers the future of defending federal statutes. Part I describes the Department's practice of defending the constitutionality of federal statutes. Part II notes some exceptions to the practice, and it explains that those exceptions highlight that the Department first and foremost represents the

2. See MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2019) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

3. See generally Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991) (discussing the phenomenon of divergent interests within the United States government).

4. See Johnsen, *supra* note 1, at 126.

5. *Texas v. United States*, 945 F.3d 355, 369 (5th Cir. 2019), *cert. granted sub nom. California v. Texas*, 140 S. Ct. 1262 (2020).

6. See Brief for the Federal Defendants at 49, *Texas*, 945 F.3d 355 (No. 19-10011).

interests of the Executive instead of the entire United States. Part III discusses how the recent challenge to the Affordable Care Act may represent a strong new departure from the practice of defending the constitutionality of federal statutes. Part IV concludes by offering some thoughts on ways to handle the defense of federal statutes in the future.

I. THE PRACTICE OF DEFENDING THE CONSTITUTIONALITY OF STATUTES

The Department has a practice of defending federal statutes from constitutional attack, even when the officials of the Department believe that the law is unconstitutional.⁷ We often see this practice with the Solicitor General's office, which decides whether to appeal any case that the federal government has lost and which represents the United States before the Supreme Court.⁸ Traditionally, the Solicitor General's office defends a federal statute from constitutional attack so long as a reasonable argument can be made to defend the constitutionality of the statute.⁹

One might think that the tradition is rooted in the ethical obligation for attorneys to exercise diligence in representing their clients.¹⁰ After all, the United States is the client of the Department, and defending the constitutionality of a federal statute, one might think, is in the interest of the United States.

But one rarely hears ethical considerations as the basis for the practice of defending statutes. One reason is that it is not always clear that defending the constitutionality of a statute is in the interests of the United States. To be sure, the Constitution is the highest law in the United States, and the United States therefore has an interest in preventing the enforcement of laws that conflict with the Constitution. Thus, for easy cases where a statute plainly violates the Constitution, the Department's obligation would be to argue against the federal statute, since the interest of all branches of the United States government is to uphold the Constitution. Similarly, when a statute is obviously constitutional, the obligation is to defend the statute, since the statute embodies the policies of the United States. But it is not always clear whether a statute is constitutional. When there is room for reasonable disagreement over the meaning of the Constitution, it is unclear whether the ethical obligation points towards attacking or defending the statute.

Confounding the problem is that the United States is not a single entity with well-defined interests. The United States is more a "they" than an "it." It consists of three different branches of government—the Executive, legislature,

7. See, e.g., Johnsen, *supra* note 1, at 126.

8. See Waxman, *supra* note 1, at 1076.

9. *Id.* at 1083 (describing the "practice of defending any Act for which reasonable arguments can be made").

10. See MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2019).

and judiciary—which are then subdivided into further parts. Each of those different components may have different interests and objectives as well as different views about the meaning of the Constitution.¹¹ The “People” also arguably form a fourth group making up the United States, and they likewise may have interests that differ from those of some or all of the branches.¹²

In the face of divergent interests, the Department cannot represent all the interests of everyone who makes up the United States. Instead, the Department must choose which set of interests to press. And because it is part of the executive branch, the Department inevitably ends up representing the interests of the executive branch.¹³

Nevertheless, even when the Department thinks a statute is unconstitutional, it will ordinarily defend that statute. If the practice of supporting the constitutionality of statutes that may not be constitutional does not rest on ethical obligations, then why does the Department have the practice of defending those statutes? The usual justification for the practice rests on prudential considerations.¹⁴ These considerations focus on the respective roles of each branch of government and the relationship between the Department and those branches.¹⁵

Defending statutes helps to preserve a good relationship between the Executive and Congress. This practice avoids the accusation that the Department is substituting its own policy choices through *constitutional arguments* for policy choices that Congress implemented through *statutes*. It also avoids unnecessarily accusing Congress of violating the Constitution. Congress has an obligation to enact only laws that it perceives are consistent with the Constitution.¹⁶ Defending the constitutionality of a statute conveys respect for

11. See *supra* text accompanying note 3.

12. Nor is defending the constitutionality of a statute always obviously in the interests of any one of these components of the United States. Although each branch has an interest in the enforcement of federal statutes, each also has an interest in the enforcement of the Constitution. That is so even for Congress. Congress changes with each election. Today’s Congress may view laws enacted by yesterday’s Congress as unconstitutional.

13. See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 18 (1987). Even so, the Department often must handle competing interests because different agencies in the executive branch may have divergent interests. See Waxman, *supra* note 1, at 1076 (describing how “every decision [the Solicitor General] makes comes in the context of a specific request” from a member of the executive branch).

14. See Waxman, *supra* note 1, at 1078 (highlighting pragmatic reasons for the practice in that it serves all three branches of government).

15. *Id.*

16. See U.S. CONST. art. VI (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”).

Congress's constitutional conclusions.¹⁷ Further, arguing in support of a statute may be particularly important to preserving smooth relations with Congress when the statute was supported by individuals who are still members of Congress.

Vigorously defending the constitutionality of statutes also maintains the Executive's relationship with the judiciary. The longstanding view is that the Constitution assigns to the judiciary the task of adjudicating whether a statute is constitutional.¹⁸ The practice of defending the constitutionality of statutes ensures that the Executive does not usurp that function but instead leaves determinations of constitutionality to the judiciary.¹⁹

The Department's practice of advocating in support of federal statutes also potentially protects the legitimacy of the federal government. It does so in at least two ways. First, it supports the Department's legitimacy because it constitutes a public signal that the Department is protecting the division of power in the Constitution by leaving policymaking to Congress and adjudication to the judiciary. Second, it potentially bolsters Congress's legitimacy. Refusing to defend a statute sends a signal that the Department, which is supposed to be acting as the advocate for the United States, has concluded that the United States has acted unlawfully. This message may lead to greater social disapproval and distrust of Congress.

To be sure, one might argue that the Department's unwillingness to defend a statute may increase the legitimacy of the executive branch. After all, those who agree with the Executive's position will think that the Executive is acting as a defender of constitutionalism. But that is likely to be so only among individuals who agree with the Executive's position. Moreover, the increased support for the Executive comes at the cost of less support for Congress, which may result in a loss of legitimacy for the United States government as a whole. By contrast, a practice of defending statutes whenever a reasonable argument can be made may be less likely to harm the legitimacy of the executive branch

17. F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1462–63 (2010). Of course, Congress does not always evaluate the constitutionality of an act. *See, e.g.*, Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 324 (2008) (describing the “intentional unconstitutionality” of the Military Commissions Act of 2006).

18. *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.”).

19. Of course, the Department can always choose not to enforce a law that it considers to be unconstitutional. *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 913 (1990); Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 587 (2008) (“[T]he President and executive agencies will refuse to follow or enforce a statute if they believe that it violates the Constitution.”). When the Department does so, it operates only in the executive sphere by choosing how and when to enforce the law. But when a case has been brought, the Department assumes the role of an advocate before the courts to assist the court in exercising its judicial power.

because the Department is not pressing its views but is merely acting in the role of advocate.

II. REFUSALS TO DEFEND FEDERAL STATUTES

Because it is based on prudential instead of ethical considerations, the practice of defending the constitutionality of federal statutes is not absolute. The Department has declined to defend statutes—and has even attacked statutes—when other considerations outweigh the prudential reasons for defending them. In those situations, even when there are reasonable arguments to support the constitutionality of the statute, the Department has refused to argue that a challenged statute is constitutional.

One circumstance in which other considerations outweigh those prudential reasons for defending a statute occurs when the President makes clear his view that the statute is unconstitutional.²⁰ For example, in *United States v. Windsor*,²¹ the Department declined to defend the constitutionality of the Defense of Marriage Act, which defined marriage as between a man and a woman,²² because the President determined the law to be unconstitutional.²³ Sometimes, the Department may even file a brief against a statute based on the President's conclusion that the statute is unconstitutional. For example, in *Metro Broadcasting v. FCC*,²⁴ presidential opposition led the Department to file a brief against the constitutionality of a federal law prohibiting the FCC from discarding regulatory preferences for minority-owned stations.²⁵

There is nothing legally objectionable about this practice. The President has an obligation to uphold the Constitution, and nothing in the Constitution suggests that Congress's interpretation of the Constitution trumps the President's. Throughout history, presidents have regularly and independently assessed the constitutionality of statutes.²⁶ A President who believes a statute is unconstitutional accordingly may argue against its constitutionality. Of course,

20. See Waxman, *supra* note 1, at 1083 (noting that the Department may not defend a statute when “it is manifest that the President has concluded that the statute is unconstitutional”).

21. 570 U.S. 744 (2013).

22. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2018)), *invalidated by Windsor*, 570 U.S. at 756; see also *Windsor*, 570 U.S. at 752–53.

23. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Statement of Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act> [<https://perma.cc/B3ME-6ATX>] (declining to defend the Act because the “President has . . . concluded that [the Act] . . . is . . . unconstitutional”).

24. 497 U.S. 547 (1990), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

25. Waxman, *supra* note 1, at 1083.

26. Easterbrook, *supra* note 19, at 906–11 (documenting instances of presidential interpretation of the Constitution); see, e.g., Michael J. Gerhardt, *Presidential Defiance and the Courts*, 12 HARV. L. & POL'Y REV. 67 (2018) (recounting instances of presidential disagreement with judicial determinations of constitutionality).

prudential considerations similar to those underlying the Department's practice of defending the constitutionality of statutes may support a practice of the President presuming a statute to be constitutional unless it is clearly unconstitutional.²⁷ But there are reasons that support independent constitutional evaluation by the President²⁸—if nothing else, it provides an additional check against the enforcement of unconstitutional statutes.

If the President determines a statute to be unconstitutional, it makes sense for Department attorneys to obey the President's wishes in these circumstances. The Department is part of the executive branch, and the President is the head of that branch. But, at the same time, these decisions not to defend the constitutionality of statutes despite the availability of reasonable arguments show that the Department represents the interests of the Executive instead of the interests of Congress or some other part of the United States.

Another circumstance in which the Department has declined to defend a statute is when the statute bears on the distribution of power between the Executive and other branches of government.²⁹ In those situations, the Department ordinarily represents the President's interests, pressing arguments against statutes that cabin his power.³⁰ Consider the recent brief filed by the United States challenging the constitutionality of 12 U.S.C. § 5491(c)(3), which prohibits the President from removing the Director of the Consumer Financial Protection Bureau except for "inefficiency, neglect of duty, or malfeasance in office."³¹ Certainly, *Humphrey's Executor v. United States*,³² which upheld the constitutionality of statutes placing conditions on the removal of heads of independent agencies,³³ provides a reasonable basis for defending the constitutionality of the statute because the Consumer Financial Protection Bureau is an independent agency. Nevertheless, the brief filed by the Department argues that the statute is unconstitutional because it unduly constrains the President's removal power.³⁴ This practice of the Department—pressing arguments that favor the President instead of the other branches—reflects the conclusion that it is more important for the Department to protect the presidency than to defend the other branches of the United States.

27. See Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994) ("The President should presume that enactments are constitutional. There will be some occasions, however, when a statute appears to conflict with the Constitution. In such cases, the President can and should exercise his independent judgment to determine whether the statute is constitutional.")

28. Easterbrook, *supra* note 19, at 927–29 (listing benefits of presidential review).

29. See Waxman, *supra* note 1, at 1084.

30. *Id.*

31. Brief for the Respondent at 3, 7, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7 (U.S. Sept. 17, 2019) (quoting 12 U.S.C. § 5491(c)(3) (2018)).

32. 295 U.S. 602 (1935).

33. *Id.* at 629–30.

34. Brief for the Respondent, *supra* note 31, at 7.

Even when the Department declines to defend a statute on the ground that there is no reasonable argument to support the act, the decision reflects the preferences of the Executive. For almost any statute, there is a reasonable argument to support its constitutionality. For example, in *Dickerson v. United States*,³⁵ the Solicitor General refused to defend a federal statute that did not require federal officers to provide *Miranda* warnings before interrogating individuals in custody.³⁶ The reason, according to then-Solicitor General Waxman, was that no reasonable argument could be made that was consistent with *Miranda*.³⁷ But the office could have launched reasonable arguments against the constitutionality of *Miranda* itself.³⁸ After all, neither the Fifth Amendment, which is the basis for *Miranda*, nor any other part of the Constitution prescribes the warnings that officers must give under *Miranda*. The office opted not to do so based on *stare decisis*.³⁹ This decision reflected the preferences of the administration. *Stare decisis* is not absolute, and the Department has on many occasions argued for the overruling of constitutional decisions.⁴⁰ If President Trump instead of President Clinton held office when *Dickerson* was litigated, the Department might have argued that *Miranda* should be overturned.

III. THE POSSIBILITY OF INCREASINGLY AGGRESSIVE CHALLENGES TO FEDERAL STATUTES

Typically, when the Department has declined to defend the constitutionality of a statute, there have been powerful reasons to doubt the statute's constitutionality.⁴¹ In such a situation, the Department opts not to make merely plausible arguments in favor of the statute in the face of those other reasons.

The recent challenge to the Patient Protection and Affordable Care Act⁴² is a departure from that typical practice. The Act has several different parts.

35. 530 U.S. 428 (2000).

36. *Id.* at 432; *see also* Waxman, *supra* note 1, at 1087.

37. Waxman, *supra* note 1, at 1087–88.

38. *See, e.g., Dickerson*, 530 U.S. at 445–46 (Scalia, J., dissenting) (arguing against the constitutionality of *Miranda*). Seth Waxman acknowledged that arguments could have been made against *Miranda*. Waxman, *supra* note 1, at 1088 (stating that a balance of considerations led him to decide not to challenge *Miranda*).

39. Waxman, *supra* note 1, at 1087–88.

40. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 208–09 (1997) (recounting an argument of the Department to overturn Establishment Clause decisions).

41. Waxman, *supra* note 1, at 1077–78, 1083–85 (providing examples of when the Department refuses to defend a statute, due to either the President's determination that the statute is unconstitutional or because defending the statute would mean asking the Supreme Court to overrule its own precedent).

42. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2018) (codified as amended in scattered sections of USC titles 21, 25, 26, 29, and 42).

One part, called the individual mandate, requires individuals to purchase insurance.⁴³ Other portions dictate how insurance operates. These include provisions requiring insurers to cover preexisting conditions, placing various caps on coverage limits, and imposing insurance obligations on employers.⁴⁴ Another portion relates to the expansion of Medicaid.⁴⁵

Many conservatives opposed the Affordable Care Act from the outset.⁴⁶ The chief complaint was that the individual mandate unconstitutionally required individuals to buy health insurance.⁴⁷ In *National Federation of Independent Business v. Sebelius*,⁴⁸ the Court upheld the individual mandate based on the taxing power.⁴⁹ Individuals who did not purchase insurance would face a tax fine.⁵⁰ The Court said this was functionally a tax: buy insurance and get lower taxes; don't buy insurance and pay higher taxes.⁵¹

After the GOP secured both houses of Congress and the presidency in the 2016 election, Congress enacted legislation reducing the tax penalty for failing to comply with the individual mandate to zero dollars.⁵² That led to the next lawsuit challenging the Affordable Care Act.⁵³ That suit argues that, because failing to buy insurance has no tax consequence, the individual mandate is no longer an exercise of the tax power and, accordingly, is unconstitutional.⁵⁴ From here, the plaintiffs make a much bigger claim. They argue that, if the mandate is unconstitutional, the entire Act must fall. According to the plaintiffs, the individual mandate is not severable from the rest of the Act.⁵⁵

The district court agreed with the plaintiffs and struck down the entire Affordable Care Act.⁵⁶ Although it defended the Act in the district court, the Department under the Trump administration switched sides in the Fifth Circuit, arguing that the entire Act must be struck down.⁵⁷ The administration's

43. 26 U.S.C. § 5000A(a) (2018).

44. 42 U.S.C. § 300gg-3(a) (2018) (preexisting conditions); *id.* § 300gg (coverage rate limitations); 26 U.S.C. § 4980H (2018) (employer shared responsibility).

45. 42 U.S.C. § 1396 (2018).

46. See Gregory M. Lipper, *The Contraceptive-Coverage Cases and Politicized Free-Exercise Lawsuits*, 2016 U. ILL. L. REV. 1331, 1333–34 (“Well before Congress enacted [the Affordable Care Act] in 2010, conservatives opposed it—quite viscerally.”).

47. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 582 (2010).

48. 567 U.S. 519 (2012).

49. *Id.* at 570.

50. *Id.* at 562–63.

51. *Id.*

52. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (codified as amended at 26 U.S.C. § 5000A(c) (2018)).

53. *Texas v. United States*, 340 F. Supp. 3d 579, 585 (N.D. Tex. 2018).

54. See *id.* at 591.

55. *Id.*

56. *Id.* at 619.

57. See Brief for the Federal Defendants, *supra* note 6, at 36–49.

position was remarkable: it did not simply opt against making a reasonable argument supporting the Affordable Care Act, which would have been consistent with the typical practice when the Department declines to defend a statute. Instead, the Department made an argument at the other end of the spectrum, pressing a position that is itself verging on unreasonable. In other words, instead of reaching out to defend the constitutionality of a statute, the Department opted to reach out to attack the constitutionality of a statute.

The Department's position was dubious for two reasons. First, whether a provision is severable depends on the intent of Congress.⁵⁸ A provision is severable if Congress meant for the rest of the law to stand if that provision were to be struck down.⁵⁹ Thus, the Department's argument that the mandate is not severable means that Congress intended the rest of the Act to fall if the mandate were struck down. That is highly unlikely. By reducing the penalty to zero dollars, Congress made the mandate an empty requirement. There is no consequence for disregarding it, so whether it is constitutional is an academic question. Striking it down would not absolve anyone of a penalty that they would otherwise have to pay. At the same time, when Congress reduced the mandate penalty to zero, it did not address the other provisions of the Act. It left them untouched. Congress therefore abolished the mandate while not overturning the other portions of the Act.

There are two likely explanations for this decision. First, either Congress deliberately preserved the other provisions of the Act, or second, it did not have the votes to remove those provisions. In either case, it is hard to say that Congress intended the whole law to fall by reducing the mandate to zero dollars. It would mean that, instead of overturning the Affordable Care Act by enacting legislation striking the Act from the books, Congress sought to overturn the Act by leaving it in place and tinkering with a single provision.

Second, and even more remarkable, the Department did not limit its argument to the provision that raises the constitutional problem: the individual mandate. Instead, by claiming the provisions are inseverable, the Department argued that all the provisions—including provisions that do *not* raise constitutional problems—should be struck down. It is hard to think of another time the Department made such a concerted effort to knock down a statutory scheme that did not raise constitutional problems.

The Fifth Circuit ultimately agreed with the plaintiffs and the Department that, after the reduction of the tax penalty, the individual mandate was no longer a valid exercise of the taxing power.⁶⁰ But the court punted on

58. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006).

59. *Id.* (stating that the inquiry is whether Congress would “have preferred what is left of its statute to no statute at all”).

60. *Texas v. United States*, 945 F.3d 355, 390 (5th Cir. 2019)), *cert. granted sub nom. California v. Texas*, 140 S. Ct. 1262 (2020).

the severability question. It vacated the district court's order on the ground that the district court was not sufficiently careful in assessing severability, and it remanded with orders that the district court reassess severability "employ[ing] a finer-toothed comb."⁶¹ This determination leaves the Department with the opportunity to continue to pursue its severability claim in the district court.

How to explain the intensity and scope of the Department's attack on the Affordable Care Act? One possible explanation is that the usual reasons for defending a statute no longer apply. Just as we should expect the Department to decline to defend a statute when other countervailing considerations outweigh the prudential reasons for defending a statute, we should also expect the Department to refuse to defend a statute when the prudential reasons simply no longer apply. For example, if one of the major reasons for defending a statute with which the Executive disagrees is to preserve a smooth relationship with Congress, we should expect to see less willingness to defend a statute when there is no need to protect that relationship—if, for example, Congress and the Executive already have a dysfunctional relationship, and the President is not particularly interested in mending that relationship.

In addition, if the Executive is not interested in preserving a relationship with Congress, we should expect to see the Department increase its willingness to *attack* federal statutes. It may no longer choose to do so when there are reasonable arguments, instead pressing views that more generally align with the philosophy of the President. The Department's attack on the Affordable Care Act may be a product of these changing dynamics. It is hardly a secret that President Trump does not aspire to placate those in Congress who have views that differ from his.⁶²

Although the Department's attack on the Affordable Care Act stands out because it is so aggressive, it may become the norm. Increasingly polarized politics suggests that the Executive and Congress often will not share the same interests, and the increased acrimony between the Executive and Congress decreases the likelihood that the Department will take pains to represent the interests of Congress.

At the same time, courts have become the forum for resolving policy disagreements.⁶³ People now routinely turn to the courts to fight vanguard

61. *Id.* at 402.

62. See, e.g., John Haltiwanger, *Trump Says He Won't Work with Democrats Until They Drop Their 'Phony Investigations' into Him*, BUS. INSIDER (May 22, 2019), <https://www.businessinsider.com/trump-says-he-wont-work-with-democrats-until-they-drop-investigations-2019-5> [<https://perma.cc/T8GT-JEQJ>]; see also Peter Baker, *Trump Wants To Neutralize Democrats on Health Care. Republicans Say Let It Go.*, N.Y. TIMES (June 16, 2019), <https://www.nytimes.com/2019/06/16/us/politics/trump-health-care-democrats-2020.html> [<https://perma.cc/JY3K-ARUK> (dark archive)].

63. Courts now hear quintessentially political determinations, such as who won an election, see *Bush v. Gore*, 531 U.S. 98, 111 (2000); see also 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, 336 (2002),

actions on legislation that they cannot get overturned in Congress. The Executive itself may not be in the practice of filing lawsuits directly challenging federal statutes, but it has supported those who have challenged federal legislation, as in the challenge to the Affordable Care Act. And it may be only a matter of time before the Executive regularly launches court actions against federal statutes.⁶⁴

IV. DEFENDING STATUTES IN THE FUTURE

What to do about this situation? One possibility is simply to stay this new course. The Department will continue to defend the constitutionality of most statutes, but it will aggressively attack those statutes with which it disagrees. Among the various downsides of this approach is that it could exacerbate political divides and escalate tensions with Congress. It also tends to politicize the courts to the extent that it seems the Executive is employing the courts to do its bidding against Congress.

Of course, there are reasons to support stronger executive attacks on statutes. For example, one of the themes of the Constitution is to limit federal law. To that end, the Constitution establishes various structural obstacles to legislation, such as bicameralism and presentment.⁶⁵ Refusing to defend legislation pushes in that direction. But those advantages come at a heavy cost.

To be sure, matters may reverse course. Over time, political tensions may abate, and the Department may take less aggressive stances against federal statutes. But that is hardly guaranteed. No doubt, the level of political tension may be higher today than many people in the past would have predicted. In the future, it is entirely possible that the Department will be less defensive of, and more aggressive toward, statutes that do not align with the views of the President.

A second option is to prohibit the Department from arguing against the constitutionality of a federal statute at all. If a suit challenges the constitutionality of a federal law, the Department can defend the statute and otherwise participate in the suit. But it cannot make any arguments against the constitutionality of the law.

and President Trump has indicated that he will appeal any impeachment proceeding to the Supreme Court, Adam Liptak, *Can Trump Challenge His Impeachment in the Supreme Court?*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/trump-impeachment-supreme-court.html> [<https://perma.cc/29Q6-VYFP> (dark archive)].

64. In the same vein, the increasing prevalence of nationwide injunctions has increased the role of the courts in resolving disputes. See, e.g., Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 350, 353 (2018) (discussing how nationwide injunctions increase the role of lower courts in policymaking).

65. U.S. CONST. art. I, § 7.

This situation is not ideal because the function of the Department is to enforce the law of the land, and the Constitution is the highest law of the land. One would therefore think that the Department has some obligation to argue against statutes that conflict with the Constitution. It would also likely result in congressional encroachments on executive power. The President will be unable to protect his domain by challenging statutes that encroach on the executive power—statutes such as those limiting his pardoning power or constraining his power to remove high-level executive officials. Indeed, Congress may even feel emboldened to enact legislation in deliberate efforts to curtail executive power. To be sure, private litigants who are harmed through statutory schemes that limit presidential powers may challenge those statutes. But they may not be in the best position to offer the strongest arguments against those statutes because their interest may not necessarily align precisely with those of the President.

A third possibility is to establish an office whose job is to defend the constitutionality of statutes. Whenever a case raises a constitutional challenge to a federal statute, this office would have the opportunity to defend the statute. One might argue that creating an office is unnecessary when the Department defends a statute and that the attorney should participate only when the Department opts not to defend a statute. In some sense, we already have this system. Although the Department has the primary role of defending statutes, it has refused to defend some statutes. In those cases, the Supreme Court has appointed counsel to represent Congress to defend the constitutionality of the statute.⁶⁶ Moreover, on at least one occasion, such as in the case *Buckley v. Valeo*,⁶⁷ the Department itself took the position of defending a statute even while attacking it by filing two separate briefs regarding the constitutionality of the statute.⁶⁸ At issue in that case was whether statutory limits on campaign contributions and expenditures violated the First Amendment.⁶⁹ The Attorney General and Federal Election Commission filed a brief defending the constitutionality of the statute.⁷⁰ The Solicitor General filed another brief on

66. See, e.g., Waxman, *supra* note 1, at 1084–85.

67. 424 U.S. 1 (1976) (per curiam).

68. Brief for Attorney General as Appellee and for the United States as Amicus Curiae at 2, *Buckley*, 424 U.S. 1 (No. 75-436) (“The Attorney General . . . joins only the separate portion of this brief that addresses . . . the Federal Election Commission’s powers, which apparently trench on authority reserved to the Executive by Article II of the Constitution.”); Brief for the Attorney General and Federal Election Commission at front cover n.1, *Buckley*, 424 U.S. 1 (No. 75-436) (“The Attorney General is participating as counsel on both this brief and the separate brief for the United States.”).

69. *Buckley*, 424 U.S. at 14.

70. Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363, 379 nn.92–93 (1987); see also Marty Lederman, *Commentary: The Return of the Robert Bork “Dueling Briefs” Strategy: Buckley v. Valeo, Susan B. Anthony List, and Ohio Attorney General DeWine*, SCOTUSBLOG (Mar. 17, 2014), <https://www.scotusblog.com/2014/03/commentary-the-return-of->

behalf of the United States taking a much more aggressive stance on the constitutionality of the statute.⁷¹

This approach, using the already-established Department to sometimes defend and sometimes challenge statutes, is satisfactory for many cases, but not all. It is possible that, because of political pressures, the Department may defend a statute but not raise the best arguments to do so. That risk goes up if a separate congressional attorney is not permitted when the Department defends a federal statute. As a result, the Department may half-heartedly defend a statute precisely to prevent the separate attorney from appearing to present a stronger argument.

Moreover, both of these approaches—appointing an amicus to defend a statute and dividing the Department to defend and attack a statute—are ad hoc solutions. They might not be observed in the future. When the Department opts not to defend a law, the court might not appoint an amicus, and the Department might opt not to file separate briefs. An office committed to defending statutes avoids this problem.

It would also result in an institution that has more expertise relating to and strategic vision for defending statutes that the Department does not defend—such as statutes limiting presidential power. Right now, the Department regularly defends statutes that arguably infringe on the Fourth Amendment rights of individuals.⁷² Moreover, the Department has often defended statutes by picking cases carefully over time, choosing the order in which to make arguments to the courts so that it can eventually establish precedent that supports a particular position. But the Department does not play a similar role in defending the constitutionality of statutes limiting the power of the President. Nor does any other office. Because of the ad hoc way in which those statutes are defended, there is no institutional role of defending statutes limiting presidential power.

CONCLUSION

The Department of Justice theoretically represents the entire United States, but in practice, it represents the interests of the Executive. That reality is unproblematic when the interests of the Executive align with the interests of the other branches. But when interests diverge, there is the possibility for conflict. Through the years, prudential considerations have muted the potential

the-robert-bork-dueling-briefs-strategy-buckley-v-valeo-susan-b-anthony-list-and-ohio-attorney-general-dewine/ [https://perma.cc/4D4U-LN8V].

71. Steele & Bowman, *supra* note 70, at 379 nn.92–93.

72. For an example from just last term, see *Carpenter v. United States*, 138 S. Ct. 2206 (2018), in which the United States argued that the Fourth Amendment did not require the government to obtain warrants in order to acquire information from wireless providers.

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conflict, leading the Department to adopt practices such as the tradition of defending federal statutes from constitutional attack.

But those practices may be at risk with increased political polarization and antagonism between branches. The Department may have greater incentives to push the Executive's agenda over Congress's agenda. It may be high time to reconsider how the interests of the United States are represented in the courts.

