In Ditching Gay Marriage Ban, Obama Reveals Surprising Views on Presidential Power

By Ben Feuer

Associated Press

Whatever you think of the merits of President Barack Obama's Feb. 23 order to U.S. Attorney General Eric H. Holder Jr. to cease all legal efforts to defend Section 3 of the Defense of Marriage Act, there can be no dispute that it was a surprisingly forceful assertion of executive authority, one with potentially profound consequences well beyond DOMA's stretch. The move comes with scant precedent — all from Republican administrations — and raises basic constitutional questions about the role each branch plays in American government.

Section 3 of DOMA defines the words "marriage" and "spouse" in all federal statutes and regulations as unions between one man and one woman. An outgrowth of Newt Gingrich's Republican-dominated House and signed by a keenly centrist President Bill Clinton in the waning days of the 1996 presidential campaign, court challenges to Section 3 have met with increasing success in recent years. 9th U.S. Circuit Court of Appeals Judge Stephen Reinhardt, acting in a non-Article III administrative oversight capacity in early 2009, was the first to find Section 3 unconstitutional on the ground that it required the Administrative Office of the U.S. Courts to violate the equal protection rights of a court employee when it denied the employee's health benefits request for his same-sex spouse.

Then, in 2010, Boston U.S. District Court Judge Joseph Tauro found Section 3 unconstitutional for violating the equal protection rights of gays and lesbians by denying them spousal health and insurance benefits. Tauro also found that by regulating marriage, Section 3 set a federal mandate on a matter traditionally left to the states, and thus violated the Constitution's Article I, Section 8 "Spending Clause" and the 10th Amendment rights of the Commonwealth of Massachusetts. These decisions are on appeal, and other challenges to DOMA's constitu-

to legislative action or judicial reproval, in line with his sworn duty to "faithfully execute" the laws.

That the Justice Department will no longer defend Section 3 does not leave the statute indefensible. Congress is empowered to hire counsel to defend DOMA, and other parties who might be injured if DOMA is unconstitutional would likely have standing to intervene in its defense. But it is still a radical shift for an administration that previously adhered to a long-standing policy requiring the Justice Department to defend acts of Congress that have any reasonable legal justification. Indeed, the Obama administration has otherwise maintained dubious legal defenses relied on by the Bush administration, including the expansive "state secrets" privilege in the *Al-haramain* warrantless wiretapping case, and the "extraordinary rendition" practice of nabbing suspected terrorists and flying them to foreign countries for especially intrusive interrogation or imprisonment.

In 1926, President Calvin Coolidge ordered the Justice Department to advocate for the unconstitutionality of a statute that limited the president's authority to remove postmasters; Sen. George Wharton Pepper was appointed to defend the law in the Justice Department's place. In 1982, President Ronald Reagan ordered the Justice Department to refuse to defend the constitutionality of an Internal Revenue Service policy denying a tax exemption to Bob Jones University due to its religious affiliation, as well as an act giving Congress veto power over certain immigration decisions by the attorney general. President George H.W. Bush twice issued such a directive to his Justice Department, the first involving minority ownership requirements for broadcasting stations and the second concerning a statute requiring cable operators to carry local channels and public interest programming. (This last case was still pending when Clinton took office, and he directed the Justice

Court R May Reg

By Robert Iafolla
Daily Journal Staff Writer

WASHINGTON — Tl Federal Trade Com does not have the authority ulate lawyers or law firms a law designed to stymie theft, the U.S. Court of App the D.C. Circuit ruled Frida

The appeals court foun gress exempted the legal sion in a law clarifying wh under a regulation known red flags rule.

The court's finding eff dismisses the America Association's August 2009 against the FTC over the ru clarifying law, passed in No 2010, was "clearly aimed precise matter in dispute" lawsuit and rendered it mo court held.

The ruling stopped short ing the commission couldn a new set of rules to regul legal profession under the theft statute. The court dic cuss this possibility, asid calling it a mere hypothetic no impact on the case at ha

"We hope this puts to

challenges to DOMA's constitutionality are currently pending, including before courts in the 9th Circuit. Public opinion has shifted dramatically on gay rights in the 15 years since DOMA's enaction. In 1996, Gallup's first poll of Americans' support for the right of same-sex couples to marry, found 68 percent opposed and only 27 percent in favor. In contrast, a late-2010 Gallup poll found 53 percent opposed and 44 percent in favor. That may be why members of Congress, including Sen. Diane Feinstein, have announced plans to introduce legislation to repeal DOMA. It may also be why the president, who repeatedly voiced opposition to gay marriage during the 2008 election campaign, said in a December 2010 press conference that his views are "constantly evolving."

It is against this backdrop that Obama made his announcement, in the form of a statutorily required letter from Holder to Senate Majority Leader John A. Boehner. The letter states that Section 3 of DOMA is unconstitutional because the history of private and public discrimination against gays and lesbians, along with a "growing acknowledgement" that sexual orientation "bears no relation" to an individual's ability to function in society, are factors that require heightened scrutiny of regulations. The letter explains that heightened scrutiny looks to Congress' stated justifications for enacting a statute, which for DOMA were steeped in moral disapproval rather than permissible legislative aims. Accordingly, the letter announces Obama's conclusion that DOMA does not survive heightened scrutiny and is unconstitutional; and that the Justice Department will no longer defend lawsuits that challenge the constitutionality of Section 3. The letter draws an important caveat, however: Obama has instructed executive branch agencies to continue enforcing Section 3 until DOMA falls either

interrogation or imprisonment.

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Obama's earlier reticence to unilaterally declare DOMA unconstitutional may hint at the dramatic constitutional nature of the move. The idea that a president has authority independent from Congress or the courts to weigh a law's constitutionality and then choose whether to have the administrative agencies under his direction defend it harkens to a constitutional theory adopted primarily by Republican administrations called the "unitary executive." This theory, embraced warmly by Bush and his chief theorist on presidential power, John Yoo, holds the president is solely responsible for the entire administrative apparatus of the U.S. government, and that the only check on the president's control over those agencies is his own interpretation of his duties under the Constitution, and the political process. Indeed, Yoo has come out publicly in support of Obama's authority to stop defending DOMA.

Now, there is a world of difference between refusing to defend a statute in court while enforcing it until it is repealed or struck (as Obama has done with Section 3), and simply refusing to enforce a law even though it has not been repealed or struck (as Bush did with surveillance and interrogation techniques). Still, only a handful of presidents have done what Obama has — and all were Republican.

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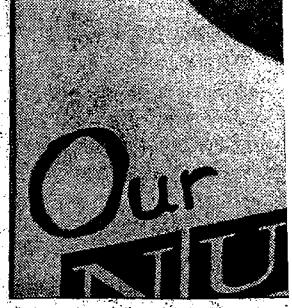
Department again to defend the statute).

Because instructions from a president not to defend a statute in court carry with them a pungent odor of political interference, these situations are notably different from those in which the solicitor general or attorney general independently concludes a given statute violates the constitution and then reports to Congress that he cannot defend it as a legal matter. Indeed, the Justice Department's unique role in defending the constitutionality of statutes is so revered that when Solicitor General Robert Bork found himself confronted in 1976 with defending the modern campaign finance regime in *Buckley v. Valeo*, even though he and President Gerald Ford both believed it unconstitutional, Bork still argued the law's defense to the Supreme Court — voicing his own constitutional objections only in an amicus brief he separately submitted on behalf of the United States.

Presidents' historical hesitation to unilaterally declare duly enacted laws unconstitutional and refuse to defend them from constitutional challenge stems no doubt from a strong desire not to see their own legislative accomplishments suffer the same fate when a president from the opposing party takes office. For example, Obama surely considered the possibility that a President Sarah Palin might one day order the Justice Department to refuse to defend his signature health care act. Also, unilateral executive constitutional decision making, particularly on such a controversial issue as gay marriage, risks a public backlash from "shortcutting" the normal process of judicial review that includes spirited advocacy from all sides.

But it is likely, at the moment, that Obama and his advisors are focused more on a different kind of precedent: the one they set for generations of gay Americans to come. Capitalizing on an inflection in the moral universe's arc, Obama's decision will no doubt aid that arc to more quickly bend, as it invariably does, toward justice. Already, parties in the Proposition 8 appeal have filed requests that the 9th Circuit lift its stay on same-sex marriages in California. How high a price that assistance comes to the Constitution's delicate interplay of checks and balances, however, remains to be seen.



Nurse Juanna Tolbert, left,

Nursing
Ammo tc

By Emma Gallegos
Daily Journal Staff Writer

California's requirement hospitals maintain nurse-to-patient ratios coul new teeth if lawmakers pass union-backed bill to give the new powers to investigate ar hospitals that flout those rati

Those investigations coul ster the claims of plaintiffs' neys who bring medical ma tice suits against hospitals, in the same way that they personal injury and wrongful cases against nursing homes

The California Nurses ciation is sponsoring the bill duced by Sen. Leland Yee, Francisco. It would fine hos $10,000 for dipping below the ing requirements four times months. The proposed legis comes at a time when staffi tios are being wielded as am tion in labor negotiations.

Hospital representatives they oppose the bill, and fought strict staffing ratios past, because it gives ther little flexibility to manage the tients effectively. Since nurse ing ratios went into effect in hospitals have been postp elective surgeries and adm patients more slowly, causin tlenecks in the emergency r according to California Ho Association spokeswoman Emerson-Shea.

Maintaining nurse staffing can be particularly difficult fo pitals during break periods, w nurse calls in sick or when r procedures become emerge but plaintiffs' attorneys say when they're most likely t