The Volokh Conspiracy

The Executive Power Grab in the Decision Not to Defend DOMA

Orin Kerr • February 23, 2011 3:49 pm

I can understand the intense political pressure on the Obama Administration not to defend DOMA. Presumably Obama and pretty much every significant lawyer in the Obama Administration opposes DOMA, whether or not they can take that position on the record. For what it's worth, I oppose it, too. At the same time, I worry that the decision may have serious long-term effects on the role of the executive branch and executive power. In this post, I want to explain my concerns, and then I'll open it up for reader comments on whether my concerns are justified.

In my view, the basic problem with the Obama Administration's position on the DOMA litigation is the same problem we had in the Bush Administration with its adoption of John Yoo's theories of Article II. Recall that John Yoo's theories of Article II power rested on a highly contested set of views about Article II power. By adopting a contested constitutional theory inside the Executive Branch, the Bush Administration could pursue its agenda without the restrictions that Congress had imposed. In effect, the simple act of picking a contested constitutional theory within the Executive branch gave power to the Executive Branch that none of the other branches thought the Exeutive Branch had (and which laws like FISA had been premised on the Administration *not* having). It was a power grab disguised as academic constitutional interpretation.

Now, I wouldn't in a million years compare torture and wiretapping with gay rights. Obviously, the subject matter is totally and completely different. But there's an interesting analytical similarity between the DOJ's position on DOMA and the Bush Administration's reliance on its Article II theories. If you look at AG Holder's reasons for why DOJ won't defend DOMA, it is premised on DOJ's adoption of a contested theory of the constitutionality of laws regulating gay rights. The letter says that "the President and [the

Attorney General] have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law then, from that perspective, there is no reasonable defense of DOMA." This theory is not compelled by caselaw. Rather, it's a possible result, one that is popular in some circles and not in others but that courts have not weighed in on much yet.

By taking that position, the Obama Administration has moved the goalposts of the usual role of the Executive branch in defending statutes. Instead of requiring DOJ to defend the constitutionality of all federal statutes if it has a reasonable basis to do so, the new approach invests within DOJ a power to conduct an independent constitutional review of the issues, to decide the main issues in the case — in this case, the degree of scrutiny for gay rights issues — and then, upon deciding the main issue, to decide if there is a reasonable basis for arguing the other side. If you take that view, the Executive Branch essentially has the power to decide what legislation it will defend based on whatever views of the Constitution are popular or associated with that Administration. It changes the role of the Executive branch in defending litigation from the traditional dutiful servant of Congress to major institutional player with a great deal of discretion.

If that approach becomes widely adopted, then it would seem to bring a considerable power shift to the Executive Branch. Here's what I fear will happen. If Congress passes legislation on a largely party-line vote, the losing side just has to fashion some constitutional theories for why the legislation is unconstitutional and then wait for its side to win the Presidency. As soon as its side wins the Presidency, activists on its side can file constitutional challenges based on the theories; the Executive branch can adopt the theories and conclude that, based on the theories, the legislation is unconstitutional; and then the challenges to the legislation will go undefended. Winning the Presidency will come with a great deal of power to decide what legislation to defend, increasing Executive branch power at the expense of Congress's power. Again, it will be a power grab disguised as academic constitutional interpretation.

Now, maybe you think that's a good thing; maybe you think, as I do, that it's a bad one. But either way I worry that it's the likely impact of shifting the Executive Branch's view on its role in determining whether to defend statutes. Are my concerns justified? What do you think? I look forward to your comments.

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