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Obama, DOMA, and Constitutional Responsibility

by Matthew J. Franck
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President Obama's decision to refuse to defend DOMA is not an act of executive assertion so much as an expression of deep deference to the courts.

Barack Obama launched his presidential campaign on February 10, 2007, in Springfield, Illinois, the hometown and burial place of Abraham Lincoln. In 2009, he chose to be sworn in with his hand on the same Bible used at Lincoln's first inauguration. He returned to Springfield a few weeks later to speak to the Abraham Lincoln Association on the 200th anniversary of the Great Emancipator's birth. Plainly the 44th president feels a strong affinity with the 16th. But how does President Obama measure up to his idol?

One of the most impressive legacies of Abraham Lincoln is his fidelity to the Constitution, and his subtle understanding of the roles and responsibilities of the officeholders in the various branches it creates. Lincoln would not begrudge the lawful process of returning runaway slaves to their masters, because the Constitution protected the slaveowner's right to his property. Likewise he held back the coercive force of the Emancipation Proclamation where the Union's civilian authority was intact or had been restored, understanding his deed as an exercise of a president's war powers in a military theater, not the act of a dictator over the whole country.

But Lincoln was no shrinking violet when it came to advancing legitimate claims of executive power—or when it came to denying the pretensions of the judicial branch to have the "last word" or an "ultimate authority" in interpreting the Constitution. From the moment he first commented on the Supreme Court's infamous *Dred Scott* case of 1857, Lincoln declared that the other branches were not obliged to conform their actions to the Court's claims that free blacks could not be citizens and that Congress could not outlaw slavery in federal territories. So as president, Lincoln had his secretary of state issue U.S. citizens' passports to free black Americans, and he signed an 1862 law restoring the prohibition of territorial slavery. And, acting on his own understanding of what the Constitution authorized in the crisis of the Civil War, Lincoln ignored a writ of *habeas corpus*, issued by Chief Justice Roger Taney, that ordered the release of a Confederate recruiter and saboteur held in Union military custody in Maryland.

Whatever one thinks of the specific stands Lincoln took on the meaning of the Constitution, he has remained the most prominent "departmentalist" in American constitutional history—taking the

view that each "department" or branch of the federal government has its own independent responsibility to interpret the Constitution—and correspondingly as the preeminent critic of judicial supremacy, the misbegotten doctrine that holds that our nation's governing charter means whatever a majority of the Supreme Court says it means. Lincoln's view has been an increasingly beleaguered one in recent decades, however, continually under assault by the Supreme Court itself and by those who find political refuge in the shelter of overreaching judicial power.

Last week, the Obama administration—speaking through Attorney General Eric Holder—announced that it would no longer argue in the courts for the constitutionality of Section 3 of the 1996 Defense of Marriage Act (DOMA), which declares that only a legal union of a man and a woman can be considered a marriage under federal law. Mr. Holder indicated that the department's attorneys would "advise courts in . . . pending DOMA litigation" that in the administration's view "Section 3 is unconstitutional." There were some critics whose immediate reaction was to say, "wait, where does the president get off doing the courts' job of judging the constitutionality of a law?" Others, who learned their constitutional law from Lincoln, recognized the legitimacy of a president's acting on his own understanding of the Constitution, and of whether a law measures up to it. But they noted rightly (as Gerard Bradley did here at *Public Discourse*) that there is something curiously amiss with the administration announcing that section 3 of DOMA is unconstitutional while still having the Department of Justice and other federal agencies enforce its terms until and unless a "final judicial finding" declares the act invalid, or Congress chooses to repeal it. Can such a Janus-faced approach even be squared with the chief executive's oath to uphold the Constitution? It is a fair question, forced on the administration by its own ill-considered action.

Professor Bradley also has ably commented on the transparent opportunism of the administration's essentially *political* (rather than *legal*) judgment in this matter. The Justice Department's official statement, and the Attorney General's letter to Speaker of the House John Boehner, preposterously claim that there is no "reasonable" defense to be made of the constitutionality of DOMA. Here the administration takes advantage of a word with equivocal meaning. In common parlance, many people would take "that's reasonable" to mean "we accept the reasons given as correct or persuasive ones." But in the terms of art used in constitutional law, an argument is considered "reasonable" not as a final assessment of its rightness but as a preliminary assessment of whether we can conceive of rational grounds for a certain view being held at all. By confounding the latter with the former, the administration announces in effect that its *political* judgment, that barring same-sex marriage is wrong, will suffice as a *constitutional* judgment, that no one can legitimately consider it right. But on any meaning of "reasonable," it is the Obama administration that has so far given no substantial grounds for rejecting the view taken by overwhelming congressional majorities, and a Democratic president, in DOMA's enactment.

Mr. Holder further muddies the waters with another kind of opportunism. Up until now, he says, his department has defended DOMA (however grudgingly) in federal judicial circuits where the "rational basis" test, the least stringent standard for assessing constitutionality, has been the legal yardstick applied by the judges to laws classifying by sexual orientation. Now, however, an

opportunity has arisen in the Second Circuit, "which has no established or binding standard for how laws concerning sexual orientation should be treated." This gives Messrs. Obama and Holder an opening to press for a more stringent "heightened scrutiny" standard. But if the administration believes there aren't even "reasonable" grounds for denying federal recognition to same-sex marriages, then it should not have had to wait for such an opening, but could have pressed its view in any federal court at any time.

While the president's "personal" position on same-sex marriage continues to "evolve," his administration has announced a view of the Constitution that tells us all we need to know about where Mr. Obama wants the country to end up. If Section 3 of DOMA is unconstitutional, for instance, what of Section 2, which relieves states of the obligation to recognize same-sex marriages entered into in other jurisdictions? This is not currently under any legal challenge to which the administration must respond, but its constitutional argument against Section 3, such as it is, works just as well against Section 2. Shouldn't the administration advise the states that it will not come to their aid with legal arguments when this too is challenged? And will it enter the federal case challenging California's Proposition 8, with an amicus brief urging its unconstitutionality? This too would seem to follow from the position the administration has now taken.

Continued enforcement of a law the president considers unconstitutional—but which he invests no political capital in attempting to repeal in Congress. An administration spinning its wheels in the federal circuit courts until an "opening" appears in one of them to maneuver more freely in the absence of precedent. An obvious muddling of political with legal arguments when it finally seizes the opportunity. A refusal to go the whole distance that logic requires while the president muses aloud about how his view is "evolving." The pattern is revealing: Obama is the "un-Lincoln," a president who would rather hint, and wheedle, and pine for an eventual Supreme Court ruling in favor of same-sex marriage, than forthrightly assert the equal standing of each branch of government to act on its own understanding of the Constitution. He makes no challenge to the reigning doctrine of judicial supremacy. Obama is instead the Court's courtier, surrendering the dignity of his office, and the legislative power of Congress, to a hope that the Supreme Court too will "evolve" in its view, change the effective meaning of the Constitution, and foist same-sex marriage on the American people with an authority more difficult to challenge than that of a mere president.

Hopeful advocates of same-sex marriage should be disappointed in the president's political cowardice. Opponents should be disgusted with his partisan legal tactics, but take heart from the fact that Mr. Obama is reduced to the expedient of such maneuvers. With popular majorities in three-fifths of the states having rejected same-sex marriage, and nothing but defeat at the polls awaiting any president who comes out squarely for it, this president is desperate to satisfy his liberal base on this issue at the least risk to himself. "Let the judges take the heat" is the motto of the left's culture warriors. After all, for two generations the Supreme Court has been "taking it" over the abortion issue. Surely the justices can "take it" over same-sex marriage as well.

From every angle—political, moral, and constitutional—Mr. Obama's low cynicism is breathtaking. Perhaps the advocates of same-sex marriage are content with "any means necessary." But no one, on either side of this issue, should confuse our current president with his great predecessor from Springfield.

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