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The President's Courthouse

By ADAM LIPTAK

WASHINGTON — "The duty of the Justice Department is to defend statutes that have been passed by Congress, unless there is some very compelling reason not to," Attorney General Eric H. Holder Jr. said during his 2009 confirmation hearings.

"Very compelling" is a high bar, and for good reason. The executive branch is ordinarily in the business of enforcing laws, not arguing that they should be nullified. Even when an administration believes a law to be bad policy or subject to plausible constitutional attack, the Justice Department almost always defends it in court. Congress enacted the law, after all, and a president has signed it. It would be an odd system in which the Justice Department routinely overrode those determinations.

But on Wednesday Mr. Holder said a federal law concerning same-sex marriage called for an exception to the department's usual practice of defending almost all federal laws in court. President Obama and he had concluded, Mr. Holder said, that part of the Defense of Marriage Act, or DOMA, was unconstitutional. The Justice Department, he said, would no longer defend the part of the law that denies federal benefits to gay and lesbian couples married in states that recognize such unions.

But the administration would continue to enforce the law, he said, meaning that, for instance, the Internal Revenue Service will not acknowledge the marriages of same-sex couples from Massachusetts. "This course of action respects the actions of the prior Congress that enacted DOMA," Mr. Holder said, "and it recognizes the judiciary as the final arbiter of the constitutional claims raised."

The question of when the executive branch may disavow laws enacted by Congress is a thorny one, particularly in light of the constitutional command that the president "take care that the laws be faithfully executed."

Charles Fried, who served as solicitor general in the Reagan administration, said Mr. Holder's decision was unseemly and pernicious.

Professor Fried, who now teaches at Harvard Law School, said he had little quarrel with Mr. Holder's evaluation of the law's constitutionality. But he said Mr. Holder had failed to make the case that an exception to the usual practice of defending federal statutes was warranted here.

"This is an unbecoming, not to mention totally unconvincing, use of excessive ingenuity in squirming out of an unpleasant duty," Professor Fried said.

Walter Dellinger, who served as acting solicitor general in the Clinton administration and is now a lawyer with O'Melveny & Myers in Washington, disagreed.

"The decision in extremely appropriate," he said. "It at one and the same time respects the other branches and takes a stand in favor of equality."

The key point, Mr. Dellinger said, was that the administration's new position will still allow courts to rule on the constitutionality of the law. The Justice Department will set out its new position, he said, and supporters of the law, including members of Congress, can file their own briefs setting out their views.

There are precedents for what the Justice Department is doing, but not many. In 1946, in United States v. Lovett, the Supreme Court considered a case about a law withholding salaries from government officials said to be radicals. The executive branch complied with the law but told the Supreme Court it was unconstitutional. A lawyer representing Congress urged the court to uphold it, and the justices struck it down.

In 1996, the same year President Bill Clinton signed the Defense of Marriage Act into law, his Justice Department announced that it would enforce but not defend in court a law that required the military to discharge personnel infected with H.I.V.

"If the Congress chooses to defend this treatment of men and women in the military, it may do so," Jack Quinn, the White House counsel, said at the time. "But this administration will not." The law was repealed, making a court fight unnecessary.

John C. Eastman, a law professor at Chapman University, said there were indeed occasional cases in which the Justice Department should decline to defend a statute, particularly when it intruded on presidential power. But a policy-based objection to the Defense of Marriage Act, he said, did not remotely qualify.

Mr. Dellinger agreed that exceptions to the usual duty to defend statutes should be rare. But

the infrequent principled stance is not worrisome, he said, so long as the courts receive good briefs on all sides and have the last word.

That is what seemed to have happened in 1990 in another case on a politically divisive issue, after an acting solicitor general told the Supreme Court that the Justice Department would not defend a Federal Communications Commission affirmative-action program because, in language echoing Mr. Holder's, it "could not withstand the exacting scrutiny required by the Constitution."

The commission filed its own brief defending the program, and the court upheld it. The acting solicitor general who refused to defend the program, John G. Roberts Jr., is now chief justice of the United States.