

Testimony of Carlos A. Ball

Subcommittee on the Constitution of the U.S. House Committee on the Judiciary

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Good morning, Mr. Chairman and members of the subcommittee. Thank you for granting me the opportunity to testify before you this morning. My name is Carlos Ball and I am a law professor at Rutgers University (Newark).

In assessing the President's decision not to defend the constitutionality of Section 3 of the Defense of Marriage Act of 1996 (DOMA), it is important to keep in mind historical, institutional, and contextual considerations. I would like to briefly go through each of these to argue that the President's decision on DOMA was both legitimate and appropriate.

I. HISTORICAL CONSIDERATIONS

It is undoubtedly the case that the executive branch, most of the time, has an obligation to defend the constitutionality of laws enacted by Congress. This obligation recognizes both that Congress, along with the President, sets policy and that it is the courts that are the final arbiters of the constitutionality of our laws.

But on some occasions, it is appropriate for the executive branch to refuse to defend laws that it believes are unconstitutional. Former Solicitor General (and later Judge) Robert Bork put this point well when he noted almost forty years ago that his office's standing before the Supreme Court

rests . . . upon a sense of obligation to the Court and to the constitutional system so that we often behave less like pure advocates than do lawyers for private interests . . . [I]t would seem to me not only institutionally unnecessary but a betrayal of profound obligations to the Court and to Constitutional processes to take the

simplistic position that whatever Congress enacts, we will defend¹

Judge Bork's views on this issue are consistent with the idea that the executive branch has an independent responsibility to assess the constitutionality of federal statutes. In fact, *every* administration over the last thirty years, both Democratic and Republican, at some point exercised its authority to refuse to defend laws that it believed were unconstitutional. Here are some examples:

- In 1983, the Department of Justice under President Ronald Reagan refused to defend the constitutionality of a law that allowed either House of Congress to invalidate an administrative decision made by the executive branch.²

- In 1990, the Department of Justice under President H.W. Bush filed an amicus brief with the Supreme Court arguing that the Court should *strike down* statutory provisions related to regulatory preferences for minority owned stations. Far from suggesting that the Court should be deferential in its constitutional assessment of the statutes in question, the Department of Justice urged the Court to apply strict scrutiny.³

- In 1992, the Department of Justice under the first President Bush informed the

¹ Letter from Robert H. Bork, Solicitor General, to Simon Lazarus III (Aug. 5, 1975), reprinted in Representation of Congress and Congressional Interests In Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong. 351, 500-01 (1975) (quoted in Seth Waxman, *Defending Congress*, 79 N.C.L. REV. 1073, 1083 (2000)).

² *INS v. Chada*, 462 U.S. 919, 959 (1983).

³ *Metro Broadcasting v. F.C.C.*, 497 U.S. 547 (1990). It bears noting that the Department of Justice's position that strict scrutiny should be applied to statutes that provided for racial preferences seemed inconsistent with prior Supreme Court rulings. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Although the Court refused to follow the administration's advice in *Metro Broadcasting*, it did later apply strict scrutiny to race-based preferential programs in *Adarand Construction v. Peña*, 515 U.S. 200 (1995).

district court that it would not defend the constitutionality of provisions in the Cable Television Act of 1992 that required cable companies to carry certain content.⁴

- In 1996, the Department of Justice under President Bill Clinton decided not to defend a statute requiring the military to discharge service members who were HIV-positive.⁵

- In 1999, the Department of Justice under President Bill Clinton refused to defend the constitutionality of a congressional law that sought to limit rights under the Supreme Court's 1966 decision in *Miranda v. Arizona*.⁶

- In 2004, the Department of Justice under President George W. Bush refused to defend a federal law that prohibited the placement of marijuana reform ads on public transportation systems.⁷

⁴ *Turner Broadcasting System v. F.C.C.*, 512 U.S. 622 (1994). The decision not to defend the constitutionality of the statute was reversed by the Department of Justice under President Bill Clinton. *See Waxman, supra* note 1, at 1084. This reversal shows that simply because there are professionally responsible arguments that can be made on behalf of the constitutionality of a law does not mean that an administration, which believes that that statute is unconstitutional, must adopt them. In other words, the fact that the Clinton Administration adopted the legal position that the statute was constitutional suggests that there was a professionally responsible argument to make on behalf of the law's validity. Yet, this did not stop the Department of Justice under President Bush from refusing to defend the statute.

⁵ Letter from Assistant Attorney General Andrew Fois to Senator Orrin Hatch, March 22, 1996.

⁶ 384 U.S. 436 (1966). The Supreme Court struck down the statute in *Dickerson v. United States*, 530 U.S. 428 (2000).

⁷ Letter from Solicitor General Paul Clement to Senate Legal Counsel, December 23, 2004 (explaining the reasons for refusing to defend federal statute subject to challenge in *ACLU v. Mineta*, 04-0262 (D. DC)).

This partial list⁸ of examples shows that there is considerable historical precedent for the idea that the President and the Attorney General are entitled, on rare occasions, to refuse to defend laws they believe are unconstitutional. The examples support the view that the executive branch has the authority and obligation to make independent determinations regarding a law's constitutionality. It is simply not the case, as some have contended, that the Obama Administration's refusal to defend the constitutionality of DOMA is unprecedented.

II. INSTITUTIONAL CONSIDERATIONS

It is also important, in assessing the appropriateness of President Obama's decision, to keep in mind that Congress recognized the reality that the executive branch sometimes decides, in rare circumstances, not to defend the constitutionality of a law when it enacted 28 USC §530D. As you know, that law requires the Attorney General to report to Congress instances in which the Department of Justice decides not to defend or enforce a particular federal law.

If Congress attempted to go beyond §530D and actually tried to limit the ability of the executive branch to apply its own independent judgment regarding the constitutionality of laws, that effort would raise serious separation of powers concerns.

It seems to me that 28 USC §530D gets it exactly right when it focuses on the issue of notification because notification allows the Congress to decide whether it wants to intervene in the lawsuit to defend the constitutionality of the statute in question. This is precisely what happened in

⁸ For additional examples, see Waxman, *supra* note 1. *See also* Letter from Assistant Attorney General Fois, *supra* note 5. The Senate Legal Counsel in the early 1990s compiled a list showing forty-five instances between 1975 and 1993 in which the Department of Justice communicated to Congress that it would decline to either defend or enforce a statute because of the administrations' view that the law in question was unconstitutional. *See id.* at 8.

the 1980s when the Reagan Administration refused to defend the constitutionality of the so called “one-House” veto provision. In that instance, Congress took the legal case over from the administration and proceeded to defend the constitutionality of the statute in the courts.⁹

We should remember, then, that an administration’s decision not to defend the constitutionality of a law does not deprive the Congress of either the authority or the ability to mount a vigorous defense of that law in the courts. In fact, I would think that supporters of DOMA would prefer that the law be defended by those who believe it is constitutional rather than by those who believe it is not.

III. CONTEXTUAL CONSIDERATIONS

Finally, it is essential, in assessing the appropriateness of the President’s decision,, to take into account the specific context in which it arose. The decision not to defend DOMA’s constitutionality came in response to two lawsuits challenging the statute filed in district courts in the Second Circuit.¹⁰ This is important because that circuit has not decided the issue of whether sexual orientation classifications require courts to apply heightened scrutiny. As a result, the Administration was directly confronted with the legal question of what degree of deference courts should give to sexual orientation classifications in a circuit where that question had not been addressed by the courts.

Critics of the President’s decision would like you to believe that it is well-settled law that

⁹ *INS v. Chada*, 462 U.S. 919, 959 (1983).

¹⁰ *Pedersen v. Office of Personnel Management*, No. 10-CV-1750 (D.Conn.); *Windsor v. United States*, No. 10-CV-8435 (S.D.N.Y.).

only rational basis review applies to sexual orientation classifications and that therefore the only thing that the Administration has to do is offer courts a rational justification for the enactment of DOMA.

But, in fact, the level of judicial review that should be applied in lawsuits that allege unconstitutional discrimination on the basis of sexual orientation is not well-settled. This is the case for four different reasons. First, the Supreme Court has never addressed the question. Although it is sometimes claimed that the Court in *Romer v. Evans* decided the level of scrutiny issue,¹¹ it in fact never reached that question, deciding only that the Colorado provision at issue could not survive even the lowest level of scrutiny.¹²

Second, even though some circuits held in the 1980s and 1990s that sexual orientation classifications were not entitled to heightened scrutiny, those courts did so on the ground that if the government could criminalize consensual same-sex activity—as the Supreme Court held it could in *Bowers v. Hardwick*¹³—then sexual orientation should not be awarded heightened scrutiny.¹⁴ That reasoning became impossible to sustain after the Supreme Court overruled *Hardwick* in *Lawrence v. Texas*.¹⁵

Third, the question of the appropriate level of review has become unclear after the Supreme

¹¹ See, e.g., *Schroeder v. Hamilton School District*, 282 F.3d 946, 951 (7th Cir. 2002).

¹² 517 U.S. 620 (1996).

¹³ 478 U.S. 186 (1986).

¹⁴ See, e.g., *Woodward v. United States*, 871 F.2d 1068, 1075 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

¹⁵ 539 U.S. 558 (2003).

Court emphatically held in *Lawrence* and in *Romer* that the rights to privacy and equality that lesbians and gay men enjoy under the Constitution impose meaningful limitations on governmental action. And, finally, several state supreme courts have recently held that sexual orientation classifications must survive heightened scrutiny.¹⁶ Although these decisions were based on interpretations of state constitutions, the state courts generally applied the same criteria used by the federal courts to determine whether heightened scrutiny was appropriate.

It is by no means clear, therefore, that rational basis review applies to sexual orientation classifications. This is especially true in a circuit, like the Second Circuit, in which the issue has not been addressed by the courts. This uncertainty made it entirely appropriate for the Administration to have reached an independent judgment regarding the legal position it wished to take on the question of heightened scrutiny.

In determining whether heightened scrutiny applies, courts have sought to answer questions such as whether lesbians and gay men have suffered a long history of discrimination and whether sexual orientation affects the ability of individuals to contribute to society. It is within the constitutional discretion of the President to make his own judgment on these issues, especially when there is no binding caselaw in the circuit in question.

To claim that the Administration somehow has an obligation to argue that lesbians and gay men have *not* suffered a long history of discrimination and that sexual orientation *is* relevant in determining a person's ability to contribute to society makes absolutely no sense when those positions are inconsistent with the Administration's clearly expressed views. The executive branch

¹⁶ See, e.g., *In re Marriage Cases*, 183 P.3d 384 (Ca. 2008); *Kerrigan v. Comm. of Pub. Health*, 957 A.2d 407 (Ct. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

does not have a constitutional obligation to make legal arguments in the courts that are grounded in propositions that it believes are fundamentally wrong.

Furthermore, not only was the President entitled to make a decision on the question of heightened scrutiny, the decision he made was the correct one. There has in fact been a long history of discrimination in this country on the basis of sexual orientation. To argue otherwise is to turn a blind eye to the way in which, until only a few years ago, many states criminalized consensual sexual conduct between gay adults in the privacy of their homes. In addition, gay civil servants for decades were investigated and thrown out of the civilian branches of the federal government. And, of course, until Congress repealed the “Don’t Ask, Don’t Tell” statute last December, thousands of gay Americans who served their country with distinction and honor were expelled from the military, often for doing nothing more than simply stating they were gay.¹⁷ Finally, gay people continue to be the victims of hate crimes at an alarming rate. According to the FBI’s statistics, hate crimes on the basis of sexual orientation, which account for almost 20% of all reported hate crimes in the country, are higher than for any category other than race or religion.¹⁸

As to the ability to contribute to society, we all know that there are lesbians and gay men who are doctors, lawyers, scientists, engineers, and even members of Congress. It is simply not credible anymore to argue that sexual orientation affects the ability of individuals to be useful and productive members of society.

On the particular question of marriage, there are those who argue that sexual orientation is still relevant because marriage is supposed to be about procreation and the optimal setting for raising

¹⁷ See, e.g., *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996).

¹⁸ See http://www.fbi.gov/news/pressrel/press-releases/2009hatecrimestats_112210.

children. But procreation, as Justice Scalia noted in his dissenting opinion in *Lawrence v. Texas*, cannot be the basis for excluding gay people from marriage because “the sterile and the elderly are allowed to marry.”¹⁹ And, on the issue of child rearing, it is indisputable that a wide consensus has emerged among experts in this country that what matters when it comes to the well-being of children is not sexual orientation but is instead the care, love, nurture, and support that parents provide to their children.²⁰

Furthermore, the procreation and child rearing arguments seem especially ill-suited in the context of the DOMA litigation. The issue in those cases is not whether there is a federal constitutional right to same-sex marriage. Instead, the issue is whether the federal government is constitutionally entitled to treat some couples who are *already married* under the laws of their states differently from other couples who are also married under their state laws.

Indeed, we need to look no further than the facts of one of the ongoing Second Circuit cases to see why DOMA is constitutionally indefensible. The plaintiff in *Windsor v. United States* is an 81-year old woman from New York who was married to her female spouse in Canada in 2007.²¹

¹⁹ *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting). *See also* Varnum v. Brien, 763 N.W.2d 862, 902 (Iowa 2009) (“the sole conceivable avenue by which exclusion of gay and lesbian people from civil marriage could promote more procreation is if the unavailability of civil marriage for same-sex partners caused homosexual individuals to ‘become’ heterosexual in order to procreate within the present traditional institution of civil marriage. The briefs, the record, our research, and common sense do not suggest such an outcome.”).

²⁰ *See, e.g.*, Affidavit of Michael Lamb, Ph.D., *Gill v. Office of Personnel Management*, No. 1:09-CV-1309 (D.C. Mass), November 11, 2009. *See also* *In Re Matter of Adoption of X.X.G and N.R.G.*, 45 So.3d 79, 85 (Fla.Ct.App 2010) (“The quality and breadth of research available, as well as the results of the studies performed about gay parenting and children of gay parents, is robust and has provided the basis for a consensus in the field.”).

²¹ *Windsor v. United States*, No. 10-CV-8435 (S.D.N.Y.).

That marriage was recognized by New York, but not by the federal government. As a result, when Ms. Windsor became a widow in 2009, she was unable to claim the estate marital tax deduction. This meant that the federal government levied a tax of \$350,000 on the estate. Arguments about procreation and the optimal setting in which to raise children do not help the government defend the rationality of this type of unfair, unjust, and quite frankly, un-American treatment of married couples when it comes to taxation.

Thank you very much for giving me the opportunity to participate in this hearing.