

10-25-2010

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Recommended Citation

Wexelblat, David. "DADT, DOMA and Fidelity to the Constitution." The Modern America Blog, entry posted October 25, 2010. http://wclmodernamerican.blogspot.com/2010/10/dadt-doma-and-fidelity-to-constitution_25.html (accessed November 19, 2010).

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Monday, October 25, 2010

DADT, DOMA and Fidelity to the Constitution

By David Wexelblat, Guest Contributor, *TMA* Staff

Last week, the blogosphere is all atwitter (pun intended) with outrage over the Department of Justice's (DOJ) decision to appeal the "Don't Ask, Don't Tell" (DADT) ruling. Many people see the DOJ's decision to appeal the District Court's injunction blocking enforcement of "Don't Ask, Don't Tell" as yet another Obama betrayal of the LGBT community, akin to his failure to follow through on getting rid of the [Defense of Marriage Act](#) (DOMA). But the issues here are larger than that - there are fundamental constitutional issues at play.

The Executive Branch has a constitutional obligation to carry into force the laws duly enacted by the Legislative Branch. The Judicial Branch has a constitutional obligation to hold each accountable for the constitutionality of those acts. The Executive and Legislature check & balance each other via the process of veto & override and/or creating/repealing legislation. The Legislature checks the Judiciary by court packing or jurisdiction stripping, per Article III authority (or the threat thereof); the Executive checks the Judiciary by refusing to implement its orders. (Whether one or more branches outweigh the others in this system of checks & balances is a debate left for another day.)

The question to be addressed is "What does this have to do with defending DADT and DOMA? They're bad law and need to go!" The answer to this question is fundamental to our system of checks & balances.

The Department of Justice, as the representative of the Executive, is obligated to defend the acts of Congress, and in doing so, acts as a check on the Judiciary. If we believe in our Constitution, the DOJ should do so vigorously. It should do so regardless of the political opinion of the administration in power. It should do so over the vociferous outcry of outraged constituencies. And we should applaud them when they do so, and revile them when they fail in that duty - even when they are defending legislation that we vigorously oppose.

This may seem contradictory and/or hypocritical, but it is neither. There are two reasons we should want them to do so:

1. When a controversial piece of legislation that we oppose is finally put to rest at the Supreme Court, no one will be able to (legitimately) challenge the validity of that decision if the legislation received a vigorous defense.
2. Sooner or later, the shoe will be on the other foot. Imagine, for example, a future Republican administration may well be asked to defend the Matthew Shepard Act. All the same people who are up in arms now about the Holder DOJ defending DADT and DOMA would be up in arms if the Republican AG failed to vociferously defend the Matthew Shepard Act.

The same people who are asking the Obama administration to sweep aside DADT and DOMA are the ones who were up in arms about the Bush administration's sweeping claims of Executive authority - military commissions created by executive order, signing statements, warrantless wiretapping, etc. What is the difference between those abuses of Executive authority and Obama unilaterally sweeping aside DADT and DOMA (or letting them fall, undefended)? I would argue that there is *no* substantive difference between them. Arguments about "these are good" and "those were bad" are emotional, political arguments. But there's a large chunk of the population that thinks "those were good" and "these are bad." And the shoe will be on the other foot, sooner or later.

It is fair to blame the politicians for failing to keep their promises. But their promises can't be "ignore laws." Their promises need to be to repeal or change laws Obama, Pelosi, Reid, etc, failing to aggressively push the political agenda is an important debate, but it is a debate that is *separate* from the question of whether or not the laws should

be defended, for which there should be no debate. People who want the system to work when their party is *out* of power need to support the system working when their party is *in* power. That means repeal by the Legislature or a fair fight in the Judiciary, not an abdication or Executive fiat.

It's worth noting that the same issue applies in *Perry v. Schwarzenegger*, although that's a bit trickier. That one is a challenge to a state constitution in federal court, not as "simple" as the federal executive addressing an act of the federal legislature in federal courts. The California government's failure to defend its own constitution is problematic - it's an abdication of their responsibility just as the Obama DOJ failing to defend DADT and DOMA would be an abdication of their responsibility. Prop 8 is indefensible, even under rational basis review. But that determination should be made with a proper adversarial process, not by abdication of responsibility.

These are some of the really hard questions that test whether or not you believe in our Constitution.

Originally posted at [The Victorious Opposition](#)

For another analysis, see Dissenting Justice, [DADT Emergency Stay: Analyzing the Law and Politics](#).

Posted by The Modern American at [3:12 PM](#)