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### February 26, 2011: The Power of the President Not to Defend the Law

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Title: The Power of the President Not to Defend the Law

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2/26/2011—In 1979, I wrote a law review article for the Tennessee Law Review entitled, The Uncertain Power of the President to Execute the Laws. The point of the article was that there were two models of executive power in American constitutional history: one, that the President himself executes the law and the other that the President can oversee execution but not necessarily do the execution himself. The tension between the two models accounts for the uncertainty of notions like independent administrative agencies and executive branch lawsuits to enforce the constitutional rights of the citizenry. These ideas are again in the news in light of the decision of the Obama Administration not to defend the Defense of Marriage Act in court on the ground of its alleged unconstitutionality. Though Attorney General Eric Holder was at Duquesne Law School on Wednesday afternoon, the day the decision was announced, he did not address the matter. The decision is not as constitutionally questionable as at first may have appeared. The President's job of course is to enforce the law rather than make judgments about the constitutionality of a law, which is presumably more a job for the courts. The Press Secretary, James Brady, made that exact point on Wednesday in making the announcement: "[t]he President is constitutionally bound to enforce the laws and enforcement of the DOMA will continue." In addition, the defense of the Defense of Marriage Act will also continue, apparently under the authority of Congress. Nevertheless, the decision raises troubling constitutional questions. I say this as a strong supporter of gay marriage, though I am pretty certain that the United States Supreme Court will not agree with the Administration that the law is unconstitutional. The President gets a veto. That seems to me to be the only chance a President gets to judge the substantive unconstitutionality of a law. Once it passes, defending it seems to me to be a part of enforcing it. (although the President does clearly have the authority to pardon those convicted under statutes the President regards as unconstitutional—see the Alien and Sedition Act.) I'm sure this has happened before, but it still sets a bad precedent.