THE SOLICITOR GENERAL'S OFFICE, TRADITION, AND CONVICTION

*Charles Fried**

CHARLES FRIED: Good morning.

Having read the remarkably detailed and deeply analytic papers by Sai Prakash and Dan Meltzer,[1] I will not try to compete with them. What I will do is offer myself as an exhibit. Our subject is the Solicitor General's duty to defend the constitutionality of an act of Congress, even though—and, actually, the issue arises only when—the Solicitor General himself or herself or the Administration in which he is an officer finds the policy and perhaps the reasoning of that statute uncongenial, to say the least. That has become an acute and somewhat comical aspect of the DOMA[2] litigation.

I should really start by saying I think DOMA is clearly unconstitutional. I don't know about the equal protection grounds. I'm of two minds about that. But it's perfectly clear to me that on federalism grounds it's far out of line, intruding on traditional state prerogatives to define and regulate family relations, and will go down the tubes. That is my prediction.

But what's anomalous about this particular event is the, I think, quite unjustified decision of the Obama Justice Department and the Solicitor General's Office not further to defend DOMA. It should be noted that at the time there was no Solicitor General, only an Acting Solicitor General, whose position was not subject to Senate confirmation. On the other side, we have one of the ablest former solicitors general, Paul Clement—and we all saw just how able he was in the course of this week[3]—engaged by the House of Representatives, to defend DOMA as a private attorney and being more or less forced out of a very lucrative partnership at King & Spalding because he was doing that. If you read the explanations of King & Spalding, they are about as lame as the explanations in the mandate case by the Heritage Foundation in their amicus brief explaining why the fact that

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1. Professors Prakash and Meltzer also presented at the *Fordham Law Review*'s Symposium, *Defense of Marriage Act: Law, Policy and the Future of Marriage*, on March 30, 2012. Professor Prakash's submission is published in this issue, 81 FORDHAM L. REV. 553 (2012).

2. Defense of Marriage Act, 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

3. The constitutionality of the Patient Protection and Affordable Care Act (PPACA) was being argued before the U.S. Supreme Court at the time of this Symposium.

they had proposed this twenty years ago doesn't mean that they really agree with it.[4]

What sets this up is the kind of drama Washington loves.

Every Solicitor General—and, of course, there was no Solicitor General at the time the decision not to defend was made—goes through a little dance at the end of his or her confirmation hearings. I vividly recall having gone through it myself. It was a perfectly pleasant occasion, my confirmation hearing, with Senator Strom Thurmond, who was then a vigorous 92, I believe [audience laughter], in the Chair. At the end of the hearings, there was an absolutely canonical interchange:

"And, Mr. Fried, if confirmed, do you undertake to defend the constitutionality of acts of Congress?"

"Yes, Mr. Chairman, I do, unless no colorable argument can be made in their defense or unless they trench on the prerogatives of the executive branch."

Every Solicitor General in recent times has gone through that particular ritual. Rituals like that—you do actually speak under oath—are taken with various degrees of seriousness. The Attorney General and Deputy Attorney General in the Watergate fiasco had promised not to fire the Independent Counsel during their confirmation hearings. They took these undertakings seriously enough that they resigned their offices, leaving it to Bob Bork to fire Archie Cox. These things are taken seriously. As I say, no Solicitor General had made that decision not to defend DOMA, and therefore had not really gone against an undertaking made under oath.

We certainly took the duty to defend seriously and the lawyers in my office took it seriously. I'm going to tell war stories, because that's my role. I'm perfectly capable of analysis, but I'm not going to indulge in it.

I remember vividly the case of *Bowen v. Kendrick*,[5] which I'm not sure any of you remember. It had to do with the Adolescent and Family Life Act.[6] Among its provisions was a provision giving federal support to organizations which engaged in teaching adolescents about the importance of abstinence prior to marriage—this is perhaps related to our topic, but distantly—as a way of avoiding teenage pregnancy.[7] The Act contained a provision which specifically said that monies must be made available to religiously related organizations.[8]

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4. Brief of Center for Constitutional Jurisprudence, Judicial Education Project, Reason Foundation, The Individual Rights Foundation, The Heritage Foundation, Ending Spending, Inc., and Former Senators George LeMieux and Hank Brown as Amici Curiae in Support of Respondents (Minimum Coverage Provision Issue), U.S. Dep't of Health & Human Servs. v. Florida, 132 S.Ct. 2566 (2012) (No. 11-398).

5. 487 U.S. 589 (1988).

6. 42 U.S.C. § 300z (2006).

7. § 300z-5.

8. Although the Adolescent and Family Life Act does not explicitly require grants to religious organizations, the importance of grants to religious organizations is emphasized throughout the Act, and all grant applicants must describe the involvement of religious organizations in their program. *See Bowen*, 487 U.S. at 606–08; *see also* § 300z–5(a)(21)(B).

The implementation of the Act produced lots and lots of evidence of nuns in the basements of churches, beautifully decorated with Guido Reni portraits of Christ or crucifixes and so on, preaching the importance of chastity and abstinence prior to marriage. This was a bit of an offense to some of the people in the ACLU, who made the mistake of turning the issue over to the abortion rights division of the ACLU instead of the separation-of-church-and-state division. Unfortunately, it was not well done.

However, I'm getting ahead of the story. In the Solicitor General's Office, we felt a certain consternation about this Act because it had been struck down below. It was now in the Supreme Court, and it fell to us to defend it. That was very hard to do, particularly on the record, parts of which I have described to you.

Indeed, in the office this case went by the nickname—"the Jesse Helms chastity belt statute"—Jesse Helms was one of the Act's sponsors. I remember getting a call from Senator Helms saying, "Mr. Fried, I understand that you're thinking of not defending my statute."

I was able—and I'll tell you in a moment why I was able—to draw myself up to my full 5'4",[9] or whatever it is, and say to him over the phone, "Senator, I have given an undertaking to defend the constitutionality of Acts of Congress, and we shall do our duty."

But I said this with such confidence only because of a wonderful assistant in my office—some of you may know him—Larry Robbins, who, after he left, set up his own extremely successful law firm in Washington, Robbins, Russell—an absolutely marvelous man, who didn't have any, how should I say, inherited or acquired sympathy for this particular provision. But he was a very good lawyer and he saw that it was his duty as a good lawyer to try to work his way through this.

He said, "You know, Charles, you realize that those people have brought a facial challenge?" We were very friendly and informal in that office—Larry had been my student. I had taught him contracts. I had taught Randy Barnett too, but as I explained to the Senate, I didn't teach him Constitutional Law. Larry Tribe did that.

And you know what a facial challenge is. A facial challenge says that there is no possible state of facts under which this could be constitutional. Of course, that made all the wonderful testimony about the nuns in the basement of St. Margaret's Church and so on quite irrelevant.

With that under our belt—and Larry actually argued the case—I quite confidently answered Senator Helms's inquiry.

It's not always that easy. The judgment has to be that you have said no colorable argument—I didn't encounter any cases where there was no colorable argument. And that gave trouble because there were in my time, and Rex Lee's time in the office, cases under the federalism rubric which were very important to my administration. They were as important to my administration as DOMA is to this administration.

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9. Professor Fried is actually 6'2".—Ed.

That had been the history. Poor Rex Lee had taken the duty to which he had committed himself under oath very seriously. After *Usery*,[10] it fell to Rex to defend the age discrimination statute in *Gregory v. Ashcroft*,[11] aspects of surface mining in *Hodel*,[12] and the *Garcia*[13] decision. He was bitterly criticized by his colleagues in the administration for doing that.

Similar issues arose for me. The two cases were *South Dakota v. Dole*[14] and *South Carolina v. Baker*,[15] both of which raised important questions of state sovereignty. By the way, President Reagan had signed into law both of the statutes involved there. I remember the counselor to the Attorney General, who liked to speak in Napoleonic phrases, saying to me, "I understand you have to do this, but, Charles, *pas trop de zèle*."

We won both of those cases, in each case with only one dissent on the federalism point, and that was Justice O'Connor.[16] I believe we defended them quite zealously. Why? Because we're lawyers, and we're lawyers for the government. You take that seriously. It's in your DNA. That, I think, is what Dan and Sai will perform molecular and other analysis upon.

Thank you very much.

10. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).
11. 501 U.S. 452 (1991).
12. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).
13. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
14. 483 U.S. 203 (1987).
15. 485 U.S. 505 (1988).
16. Justice Brennan also dissented in *South Dakota v. Dole*. *See* 483 U.S. at 212.