

# “TAKE CARE” AND HEALTH CARE

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**W**e begin our inaugural edition of *Pub. L. Misc.* with the Obama Administration’s recent decision not to defend the Defense of Marriage Act against constitutional attack. Given the sensitive and emotional nature of the issue, it is no surprise that the announcement has attracted strong reaction in various quarters, both positive and negative.

Some critics have claimed President Obama has exceeded the bounds of his role as President in interpreting the Constitution. Some have even taken to criticizing the President for violating his constitutional duty under Article II to “take Care that the Laws be faithfully executed.”

The Justice Department is often said to have a general “duty to defend” federal statutes against constitutional attack. But there is also significant historical evidence that the duty is not absolute – and includes room for executive discretion.

Some scholars may also recall discussions during the previous Presidential Administration regarding the use of Presidential signing statements to opine on the validity of federal statutes and to refuse enforcement of provisions deemed unconstitutional. We invite scholars to consider whether the Presidential decision to opine on the constitutionality of a federal statutory provision in an Executive Branch document is similar to or different from a Presidential directive not to defend such a provision in court documents.

In light of the current controversy, we publish in *Pub. L. Misc.* two documents from the U.S. Department of Justice – one during

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the Clinton Administration concerning the duty to defend, and another during the Bush Administration concerning Presidential signing statements.

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Of course, just because something can be done doesn't necessarily mean it *should* be done. While some have criticized the President for refusing to defend DOMA, others have suggested that the shoe may someday be on the other foot – and that a future President might abandon the defense of any number of laws favored by the current one.

If there is higher profile constitutional litigation pending anywhere in the nation today, it may be the litigation surrounding the Patient Protection and Affordable Care Act. And there is, to be sure, no shortage of government officials who have stated quite emphatically their belief that the Act is unconstitutional – especially its so-called individual mandate provision.

But does that mean a future President would be within his or her right not to defend it? And even if it would fall within his or her constitutional authority to do so, would it be a proper exercise of good judgment? We look forward to scholarly discussion on that point as well.

To stir this particular pot, we publish in *Pub. L. Misc.* a series of documents from both sides of the debate from the community of state attorneys general – another potentially rich source of legal analysis that we hope will regularly add to the treasure trove of materials to be featured by *Pub. L. Misc.* We begin with two letters to Congress, authored by state attorneys general who argued that the legislation was unconstitutional months before it was even signed into law. And we end with an amicus brief later filed by other state attorneys general in support of the Act.

Professor Currie never got the chance to publish a series on *The Constitution in the States*. Perhaps he never would have. Even so, we are heartened to imagine him, somewhere, smiling – and perhaps even willing to endorse these efforts, if he could.