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THE CONSTITUTION, THE WHITE HOUSE, AND THE MILITARY HIV BAN: A NEW THRESHOLD FOR PRESIDENTIAL NON-DEFENSE OF STATUTES

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The President's constitutional duty to "take Care that the Laws be faithfully executed" implies that the President is entrusted with the responsibility to defend those laws against court challenges. On occasion, however, Presidents faced with legislation that they deem unconstitutional have declined to defend that legislation against legal challenges. On February 10, 1996, President Clinton declined to defend a provision included in the National Defense Authorization Act for Fiscal Year 1996 that required discharge from the military of all HIV-positive servicemembers because he believed that the provision violated the Equal Protection Clause of the Fourteenth Amendment. This Note explores whether President Clinton's decision not to defend the HIV provision was appropriate as a matter of law and policy. This Note asserts that President Clinton's decision reflects an emerging practice that allows the President to meet a lower threshold of unconstitutionality before declining to defend legislation: the President may decline to defend legislation where he determines that the legislation is probably, although not necessarily patently, unconstitutional. This Note concludes that requiring a lower threshold for presidential non-defense of legislation satisfies separation of powers concerns and is appropriate as an executive branch prerogative.

On February 10, 1996, the National Defense Authorization Act for Fiscal Year 1996 became law.[1] The Act contained a provision requiring the discharge from the military of all human immunodeficiency virus seropositive (HIV-positive) servicemembers.[2] When he signed the bill into law, President Bill Clinton objected to the HIV provision, calling it unconstitutional. Relying on precedent that suggests that presidential non-defense of legislation may be appropriate where the constitutionality of legislation is not a matter of clear, settled law,[3]

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1. Pub. L. No. 104-106, 110 Stat. 186 (1996) (amending 10 U.S.C. § 1177 (1994)).
2. *See* § 567, 110 Stat. at 328–29.
3. *See infra* notes 82–83 and accompanying text.

the President directed the Department of Justice not to defend it against court challenges.[4] Two months later, the provision was repealed.[5]

This Note explores whether President Clinton's legally controversial but politically popular decision not to defend the HIV provision against legal challenges was appropriate as a matter of law and policy. Part I describes the legislative history of the HIV provision and details President Clinton's response to the ban. Part I also examines public opinion regarding the proposed discharges.

Part II asserts that President Clinton's decision not to defend the HIV provision evinces an emerging practice that allows the President to meet a lower threshold in determining that legislation is unconstitutional and therefore not worthy of defense by the executive branch against legal challenges.[6] This Part first discusses the President's constitutionally established duty to "take Care that the Laws be faithfully executed."[7] Part II then delineates an emerging distinction asserted by the executive branch between the strength of constitutional precedent necessary for non-defense, as opposed to non-enforcement, of legislation it deems unconstitutional. This Part outlines standards drawn from legal precedent that support a lower threshold for executive branch refusals to defend a statute. While traditionally the executive branch has maintained that it may decline to defend only "patently" unconstitutional legislation, recent practice suggests that a President may decline to defend legislation that is merely "probably" unconstitutional—where no relevant legal precedent establishes the unconstitutionality of the legislation, but arguments in defense of the legislation's constitutionality are not "reasonable" or even "respectable." Part

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4. *See* Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 WEEKLY COMP. PRES. DOC. 260, 261 (Feb. 10, 1996) [hereinafter Signing Statement].

5. *See* Act of Apr. 26, 1996, Pub. L. No. 104-134, § 2707, 110 Stat. 1321, 1330; *see also* 142 CONG. REC. H3930 (daily ed. Apr. 25, 1996); Philip Shenon, *Mandate that H.I.V. Troops Be Discharged Is Set for Repeal*, N.Y. TIMES, Apr. 25, 1996, at B13.

6. The concept of differing thresholds of constitutionality seems odd: legislation is either constitutional or unconstitutional. This Note explores, however, whether it is appropriate for the President to decline to defend only "patently" unconstitutional legislation—where the Supreme Court has previously held the issue raised by the legislation unconstitutional—or whether the President also may decline to defend legislation that is "probably" unconstitutional in light of relevant judicial precedent. Additionally, this Note explores the extent to which the President may allow his policy goals or political agenda to inform his constitutional analysis of legislation.

7. U.S. CONST. art. II, § 3.

II presents arguments defending and attacking the constitutionality of the HIV ban, and argues that the HIV ban was at best "probably," but certainly not "patently," unconstitutional. Thus, President Clinton's decision not to defend the HIV ban is consistent with a lower threshold of unconstitutionality to warrant presidential non-defense of legislation.

Part III contemplates whether a lower threshold for non-defense of legislation is appropriate as a matter of policy. Using President Clinton's decision not to defend the HIV provision as a model, this Part evaluates concerns about presidential authority to decline to defend legislation and outlines how principles of constitutional and democratic theory may alleviate those concerns. Part III argues that the lower threshold reflected in President Clinton's decision not to defend the constitutionality of the HIV provision is consistent with the separation of powers mandated by the Constitution and is appropriate as an executive branch prerogative.

I. THE HIV PROVISION AND PRESIDENT CLINTON'S RESPONSE

The National Defense Authorization Act for Fiscal Year 1996 contained a rider requiring the Department of Defense to discharge all members of the military who tested positive for HIV.[8]

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8. *See* § 567, 110 Stat. at 328. As of the law's signing in February 1996, 1049 servicemembers had tested positive for HIV. *See Clinton Won't Defend HIV Law; Repeal Proposed*, 11 AIDS POL'Y & L., Feb. 23, 1996, at 1, 10 (citing Pentagon sources); *see also* Joint Statement by Secretary of Defense William J. Perry and Chairman of the Joint Chiefs of Staff General John M. Shalikashvili (Feb. 9, 1996) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter DOD/Joint Chiefs Statement]:

> This provision will require the discharge of over 1000 service members who, although they have tested HIV-positive, are currently deemed fit to perform their duties. While non-deployable, they join other service members in that category.
>
> To discharge all of these service members arbitrarily as section 567 mandates would be both unwarranted and unwise.
>
> Section 567 is unnecessary as a matter of sound military policy because there is already in place a physical evaluation system to determine the fitness for duty of HIV-positive personnel.
>
> Discharging service members deemed fit for duty would waste the government's investment in the training of these individuals and be disruptive to the military programs in which they play an integral role.
>
> There are service members who suffer from diseases that make them non-deployable, but who are still permitted to serve their country so long as they meet uniform retention standards. Decisions on their retention are made on an individual basis in accordance with current regulations. Section 567 singles out those members who are HIV-positive and requires discharge regardless of their

Under Pentagon policy in effect since the 1980s, HIV-positive servicemembers were allowed to remain on duty as long as they were physically able.[9] As with other chronic medical conditions, military personnel with HIV could not be deployed overseas.[10] Yet, the earlier law protected servicemembers with HIV from adverse employment actions based on their HIV-positive status.[11]

A. Legislative History

The legislative history of the Act provides little explanation for Congress' decision to alter the established policy regarding HIV-positive servicemembers. Congress did not conduct hearings on the need for such discharges.[12] The provision was attached as a rider to a defense authorization bill that provided $256 billion in funding for military programs, and was not included in the original version of the bill passed in the Senate.[13] Neither house conducted debate or a direct vote on the provision.[14]

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ability to perform. This violates a standard traditionally used by the services for retention and thus undermines a fair policy of evaluating retention on medical and service issues on an individual basis.

Id.

9. *See* 10 U.S.C. § 1201(3)(B) (1994) (requiring 30% disability rating for medical discharge); 10 U.S.C. § 1074 note (1994) (Restriction on Use of Information Obtained During Certain Epidemiologic-Assessment Interviews). HIV-positive servicemembers who were asymptomatic of the severe health complications associated with AIDS were considered zero percent disabled. *See* 38 C.F.R. § 4.88b (1996).

10. *See* DOD/Joint Chiefs Statement, *supra* note 8; *see also Clinton Won't Defend HIV Law; Repeal Proposed*, *supra* note 8, at 10 (noting that military personnel with heart disease, cancer, or asthma cannot be deployed overseas). Servicemembers with HIV constitute roughly one-fifth of all personnel on restricted deployment for medical reasons. *See id.*; *see also* 142 CONG. REC. S448 (daily ed. Jan. 26, 1996) (statement of Sen. Nunn).

11. *See* 10 U.S.C. § 1074 note ("Information obtained by the Department of Defense during or as a result of an epidemiologic-assessment interview with [an HIV-positive] member of the Armed Forces may not be used to support any adverse personnel action against the member."); Doe v. Marsh, No. 89-1383-OG, 1990 U.S. Dist. LEXIS 1442, at *12 (D.D.C. Feb. 8, 1990) (noting that the former policy "prohibit[ed] the [Armed Forces] from taking 'adverse personnel action' against a soldier who tests HIV positive").

12. *See* 142 CONG. REC. S2294 (daily ed. Mar. 19, 1996) (statement of Sen. Nunn); 141 CONG. REC. H5790 (daily ed. June 13, 1995) (statement of Rep. Harman).

13. *See* 142 CONG. REC. S2294 (daily ed. Mar. 19, 1996) (statement of Sen. Nunn). A majority of the Senate Armed Services Committee opposed the HIV provision. *See* 142 CONG. REC. S458 (daily ed. Jan. 26, 1996).

14. *See* 142 CONG. REC. S2292-94 (daily ed. Mar. 19, 1996) (statement of Sen. Nunn). Several members of Congress stated that the provision was never debated in the

A House committee report accompanying an early version of the bill, issued without any hearings or debate, recommended the discharge of HIV-positive servicemembers "because the retention of such personnel degrades unit readiness and fails to protect deployment equity among service members."[15] Aside from this general statement, the record contained no articulated basis for the provision or for treating HIV-positive servicemembers differently than other non-deployable personnel.[16]

The sponsor of the discharge provision, Representative Robert Dornan, was the principal member of Congress advocating the need for the ban.[17] Representative Dornan repeatedly emphasized his belief that HIV-positive servicemembers contracted the virus through misconduct, stating:

> [HIV] is spread by human God-given free will. . . . It is all from one of three causes, all of them in violation of the Uniform Code of Military Justice. Rolling up your white, khaki or blue uniform sleeve and sticking a contaminated filthy needle in your arm. . . .
>
> Heterosexual sex with prostitutes in an off-limits prostitution house where all of the prostitutes are infected with the AIDS virus . . . and the third category that seems to drive this whole thing politically, having unprotected sex with strangers in some hideaway or men's room somewhere, high-risk sex with strangers that is homosexual . . . .[18]

House because most members believed it would be eliminated in the Senate. *See, e.g.*, 141 CONG. REC. E2417 (daily ed. Dec. 19, 1995) (statement of Rep. Gunderson).

15. H.R. REP. NO. 104-131, at 223 (1995). *But see id.* at 657 (arguing that the support of existing policy by the Department of Defense and by all four branches of the military is evidence that mandatory discharge of HIV-positive servicemembers is unnecessary).

16. *See* 142 CONG. REC. S2294 (daily ed. Mar. 19, 1996) (statement of Sen. Nunn).

17. *See, e.g.*, 142 CONG. REC. H1213-15 (daily ed. Feb. 1, 1996); Robert Dornan, *Oust HIV-Infected from Military*, TIMES-PICAYUNE (New Orleans), Mar. 26, 1996, at B7. Representative Dornan had attempted to include a similar ban in prior defense authorization bills. *Cf.* 140 CONG. REC. H4204 (daily ed. June 8, 1994) (discussing the "Dornan language" proposed in the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2682; 139 CONG. REC. H7081, 7113 (daily ed. Sept. 28, 1993) (discussing proposed amendments to the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1738).

18. 141 CONG. REC. H11,760 (daily ed. Nov. 2, 1995); *see also* 142 CONG. REC. H1213-14 (daily ed. Feb. 1, 1996). After the HIV provision became law, Representative Dornan indicated that he had obtained evidence of the causes of HIV transmission among marines. *See* 142 CONG. REC. H8823 (daily ed. July 30, 1996) (statement of Rep. Dornan). Representative Dornan stated that of the 56 marines who had tested positive for HIV, none, according to Marine Corps officials, became infected through tainted

In other statements, Representative Dornan suggested that servicemembers afflicted with HIV were fortunate to receive honorable discharges, citing the same reasons.[19] Although certain individual armed forces officials supported the provision,[20] top military leaders vehemently disagreed with the rationale for the ban and informed Congress of their opposition to its passage.[21]

B. President Clinton's Response and the HIV Provision's Repeal

President Clinton vetoed the defense bill when it was presented initially to him, citing the HIV provision as one of his reasons for objecting to the legislation.[22]

Congress revised the bill to address some of the President's objections, but the HIV provision remained in the legislation.[23]

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transfusions of blood or tissue products. *See id.* Dornan concluded from this information that these marines contracted the virus through sex with prostitutes, same-sex sexual conduct, or drug use. *See id.*

19. *See* 142 CONG. REC. H817 (daily ed. Jan. 24, 1996) (statement of Rep. Dornan); Dornan, *supra* note 17, at B7.

20. For example, in 1993, Admiral Frank Kelso, then Chief of Naval Operations, wrote to Representative Dornan that retaining HIV-positive servicemembers significantly disrupted deployment rotations. *See* Letter from Admiral Frank B. Kelso II, U.S. Navy, to Representative Robert K. Dornan (Sept. 2, 1993), *in* 142 CONG. REC. H1214-15 (daily ed. Feb. 1, 1996); *see also* Letter from General C.E. Mundy, Jr., U.S. Marine Corps, to Representative Robert K. Dornan (July 23, 1993), *in* 142 CONG. REC. H1214; Letter from Michael F. Ouellette, Director of Legislative Affairs, Non-Commissioned Officers Association of the United States of America, to Representative Robert K. Dornan (June 7, 1994), *in* 142 CONG. REC. H1215 (daily ed. Feb. 1, 1996).

21. *See* Letter from William Perry, Secretary of Defense, to Representative Thomas A. Daschle, U.S. Senate Democratic Leader (Dec. 15, 1995), *in* 141 CONG. REC. S18,900 (daily ed. Dec. 19, 1995); *see also* 141 CONG. REC. S18,812 (daily ed. Dec. 18, 1995) (statement of Sen. Kennedy) ("The Defense Department has made clear its opposition to this requirement."); 141 CONG. REC. H14,942–43 (daily ed. Dec. 15, 1995) (statement of Rep. Solomon); John Diamond, *Defense Debate Turns into Abortion, AIDS Battle*, ASSOCIATED PRESS, May 24, 1995, *available in* LEXIS, News Library, Curnws File.

22. *See* Message to the House of Representatives Returning Without Approval the National Defense Authorization Act for Fiscal Year 1996, 31 WEEKLY COMP. PRES. DOC. 2233, 2233–34 (Dec. 28, 1995) [hereinafter Message to the House]. Other objections included a provision limiting the President's authority to put U.S. troops under the United Nations' control and funding for anti-missile defenses. *See id.* at 2234. Congress subsequently removed these provisions. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186; Signing Statement, *supra* note 4, at 260.

23. *See* Signing Statement, *supra* note 4, at 260–61.

During the ten-day presentment period, the Clinton Administration struggled to find a way to sign the military bill and at the same time to oppose the "completely abhorrent and offensive" HIV provision.[24]

On February 10, 1996, President Clinton signed the legislation[25] because he considered the $265 billion in funding for military defense programs[26] vital to national security and troop morale.[27] Nevertheless, he continued vigorously to oppose the HIV provision.[28]

In a statement that accompanied the signing of the bill, President Clinton announced his response to the HIV provision.[29] Calling the ban unconstitutional, the President instructed the Attorney General not to defend the provision in court.[30] The President called the provision "blatantly discriminatory"[31] and noted that the discharges were not justified by any legitimate medical, public health, or military objective. Relying on the opinions of the Secretary of Defense and of the Chairman of the Joint Chiefs of Staff,[32] the President concluded that the provision violated "equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental

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24. Alison Mitchell, *President Finds a Way to Fight Mandate to Oust H.I.V. Troops*, N.Y. TIMES, Feb. 10, 1996, at A1 (quoting White House Counsel Jack Quinn).

25. *See* Signing Statement, *supra* note 4, at 260.

26. *See House Republicans Bend to Clinton on Defense Bill*, CHI. TRIB., Jan. 25, 1996, § 1, at 8. The Act included, among other provisions, a pay raise for servicemembers, *see* Pub. L. No. 104-106, § 601, 110 Stat. 186, 356 (1996), funding for construction of military facilities, *see id.* §§ 2001–2703, 110 Stat. at 523–43, funding for NATO operations, *see id.* §§ 1331–1336, 110 Stat. at 482–85, and a new procurement reform initiative, *see id.* §§ 4001–4322, 110 Stat. at 642–77.

27. *Cf.* Signing Statement, *supra* note 4, at 260–61. The HIV ban may have been a "second-tier" issue for the President. *See House Republicans Bend to Clinton on Defense Bill*, *supra* note 26, at 8 (quoting a "senior White House official"). When the HIV ban remained in the legislation after the first veto, it was not important enough on its own to warrant a second veto after the President's other, more serious, policy objections had been addressed. *See id.*

28. *See* Signing Statement, *supra* note 4, at 261; Memorandum on Benefits for Military Personnel Subject to Involuntary Separation, 32 WEEKLY COMP. PRES. DOC. 228, 228 (Feb. 9, 1996) [hereinafter Benefits Memorandum].

29. *See* Signing Statement, *supra* note 4, at 261.

30. *See id.* The Department of Justice verbally advised the President on the applicable legal standard in evaluating the constitutionality of the provision and did not provide any written advice. *See* Letter from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Senator Orrin G. Hatch, Chairman, Senate Committee on the Judiciary 1 (Mar. 22, 1996) (on file with the *University of Michigan Journal of Law Reform*).

31. Signing Statement, *supra* note 4, at 261.

32. *See* DOD/Joint Chiefs Statement, *supra* note 8.

purpose."[33] The President called the provision "clearly discriminatory," "wholly unwarranted," and "highly punitive."[34] The executive branch believed that its decision not to defend the law would increase the likelihood that a court would invalidate the law as unconstitutional.[35]

Concurrently, President Clinton directed various federal agencies to enforce and implement the legislation,[36] distinguishing enforcement from the non-defense of the legislation.[37] The President also vowed to push efforts on Capitol Hill to repeal the HIV provision.[38] Finally, because the HIV provision denied disability benefits and health coverage to family members of HIV-positive servicemembers,[39] the President directed the Department of Defense, the Department of Transportation, and the Veterans Administration to take all necessary steps to ensure that affected servicemembers and their families would receive the full benefits "to which they would otherwise be entitled had they continued to serve until it became medically necessary for them to retire."[40]

Ultimately, the President's repeal effort was successful. One month after the bill was signed, the Senate voted without debate to repeal the HIV ban and attached the repeal to an

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33. Signing Statement, *supra* note 4, at 261.

34. Benefits Memorandum, *supra* note 28, at 228.

35. *See* White House Press Briefing by Counsel to the President Jack Quinn and Assistant Attorney General Walter Dellinger 7 (Feb. 9, 1996), *available in* LEXIS, Legis Library, Poltrn File [hereinafter Quinn/Dellinger Briefing] ("In our judgment—*and I think our having taken the position we do contributes to this outcome*—the likelihood is that a court will see at an early point in time that the plaintiffs in these cases have a very high likelihood of success on the merits." (statement of White House Counsel Jack Quinn) (emphasis added)).

36. *See* Signing Statement, *supra* note 4, at 261.

37. *See* Quinn/Dellinger Briefing, *supra* note 35, at 3. The Justice Department advised President Clinton that because no court had determined whether the provision was constitutional, he was obligated to enforce the law. *See id.* at 3 (statement of Assistant Attorney General Walter Dellinger).

38. *See* Signing Statement, *supra* note 4, at 261.

39. *See* Benefits Memorandum, *supra* note 28, at 228. To receive disability benefits, members must show at least 30% disability under the standard schedule of rating disabilities used by the Veterans' Administration. *See* 10 U.S.C. § 1201 (1994). According to that Veterans' Administration schedule, persons with HIV who are asymptomatic are considered zero percent disabled, and thus certain servicemembers would not be entitled to medical or disability benefits. *See* 38 C.F.R. § 4.88b (1996); *cf. Clinton Won't Defend HIV Law; Repeal Proposed*, *supra* note 8, at 10. The loss of health coverage to family members was a critical concern; approximately 50% of servicemembers with HIV have spouses who are also infected with the virus. *See id.*; Dana Priest, *Army Sergeant with HIV Feels Deserted by Policy*, WASH. POST, Feb. 1, 1996, at A3 (noting Department of Defense data that one-half of the servicemembers infected with HIV are married).

40. Benefits Memorandum, *supra* note 28, at 228; *see also* Signing Statement, *supra* note 4, at 261.

omnibus budget bill by unanimous consent.[41] On April 25, 1996, the repeal was passed by both houses, just two months after the legislation was enacted.[42]

C. Public Opinion

President Clinton's opposition to the HIV ban, and its subsequent repeal, reflected public opinion about the provision. Popular sentiment appeared sympathetic toward servicemembers discharged under the provision, and supported the President's disapproval of the ban.[43] Moreover, public opposition

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41. *See* John Diamond, *Senate Moves to Junk Law on Military AIDS Discharges: Wide Spectrum of Groups Opposes Bill Requiring Expulsion of HIV Positive Soldiers*, ROCKY MTN. NEWS, Mar. 20, 1996, at 30A; Janet Hook, *Senate Rejects Law to Oust HIV Carriers from Military*, L.A. TIMES, Mar. 20, 1996, at A1.

42. *See* Act of April 25, 1996, Pub. L. No. 104-134, § 2707, 110 Stat. 1321, 1330; *see also* Eric Pianin & John F. Harris, *Clinton, Congress Reach '96 Budget Agreement: Funding Restored for Some White House Priorities; Targeted Agencies Appear to Face Less Drastic Cuts*, WASH. POST, Apr. 25, 1996, at A1. Representative Dornan subsequently reinserted the HIV discharge provision in the National Defense Authorization Act for Fiscal Year 1997, but the conference committee removed it. *See* 142 CONG. REC. S10,125–27 (daily ed. Sept. 10, 1996); 142 CONG. REC. H9821 (daily ed. Aug. 1, 1996); *see also* 142 CONG. REC. H4927 (daily ed. May 14, 1996).

43. *See* Editorial, *A Backward Measure*, CHRISTIAN SCI. MONITOR, Feb. 12, 1996, at 20, *available in* LEXIS, News Library, Curnws File ("In the military, as in professional sports, it's time to go forward, not back."); *A Law Not Worth Defending*, ROCKY MTN. NEWS, Feb. 14, 1996, at 47A (opposing HIV ban and stating that "[i]t's a stupid law, and Clinton is right not to defend it"); *A Well-Aimed Bout for HIV Rule: House Should Follow Senate Lead on Military Discharge Mandate*, L.A. TIMES, Mar. 28, 1996, at B8, *available in* LEXIS, News Library, Curnws File (opposing the HIV provision as "senseless," "mean-spirited," and "a shameful waste"); *Another HIV Setback*, SEATTLE TIMES, Feb. 8, 1996, at B4, *available in* LEXIS, News Library, Curnws File (opposing the HIV ban and stating that "Dornan's rider has the odor of brimstone instead of thoughtful public policy"); *Clinton Zaps Defense Bill's 2 Clinkers*, MORNING CALL (Allentown), Feb. 13, 1996, at A10, *available in* LEXIS, News Library, Curnws File ("It is medically unsound. Congress should repeal it immediately . . . ."); *Crossing the Line: Law to Compel the Discharge of HIV Positive Military Personnel*, NEW REPUBLIC, Feb. 19, 1996, at 9, *available in* LEXIS, News Library, Curnws File ("The military, which has an exemplary record in dealing with HIV-positive personnel, didn't want it . . . ."); *HIV and DoD*, WASH. POST, Jan. 30, 1996, at A14 (opposing the HIV provision and stating that President Clinton "is right to condemn Rep. Dornan's handiwork and pledge every effort to get it repealed or overturned by the courts"); *HIV Policy: Military Should be Consistent on Medical Discharges*, DALLAS MORNING NEWS, June 20, 1995, at 10A, *available in* LEXIS, News Library, Curnws File (calling the ban "misguided" and noting that the purported rationales, if sound, ought to apply to all disabling medical conditions); *Ill-considered Policies: HIV, B-2 Measures are shortsighted Politics*, SAN DIEGO UNION-TRIB., Feb. 13, 1996, at B-8, *available in* LEXIS, News Library, Curnws File (stating that the provision is "wrongheaded" and "morally indefensible"

did not break down along political party lines. Conservative commentators, government officials, and sports figures, including Earvin "Magic" Johnson, all expressed outrage at the provision and called for its repeal.[44] The quick repeal of the provision was certainly prompted in part by public disapproval of the ban. One Senate aide noted that opponents of the repeal seemed to shy away from a fight because it was "clearly a losing cause."[45] Finally, the punitive nature of Representative Dornan's rationale for the ban[46] did not mirror public sentiment. Opinion polls have demonstrated a decline in the

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because it forces discharge of "productive" asymptomatic personnel); Charles Krauthammer, *The GOP'S HIV Disgrace*, WASH. POST, Feb. 2, 1996, at A19 ("It is hard to imagine a more mean-spirited and useless provision in any bill. On the merits, it is simply a manifestation of bigotry."); *Legal Discrimination in Armed Services*, TENNESEAN, Feb. 15, 1996, at 12A, *available in* LEXIS, News Library, Curnws File (opining that the ban "makes no sense medically or militarily"); Tom Teepen, *Congress Returns to the Dark Ages on HIV Policy for the Military*, ATLANTA J.-CONST., Feb. 11, 1996, *available in* 1996 WL 8188637 (urging "quick adoption" of bills repealing the ban on grounds of "[c]ommon decency and national self-respect"); *Unfair Ban on HIV in Uniform*, S.F. EXAMINER, Feb. 12, 1996, at A-16, *available in* LEXIS, News Library, Curnws File (calling the HIV provision "ill-considered" and "distasteful"); DeWayne Wickham, *Given a Choice—Better to be in a Foxhole with Magic than Dornan*, GANNETT NEWS SERVICE, Feb. 1, 1996, *available in* LEXIS, News Library, Curnws File (arguing that prior military HIV policy "makes sense" but that the new rule does not). *But see* Mario Battista, *People Who are HIV-Positive Don't Belong in the Military*, ST. PETERSBURG TIMES, June 17, 1995, at 17A, *available in* LEXIS, News Library, Curnws File (supporting discharge policy because all military service involves physical danger).

Public sympathy may reflect the change in attitudes toward HIV that occurred as more information about the virus became available. *See* CENTERS FOR DISEASE CONTROL & PREVENTION, *AIDS Knowledge and Attitudes for 1992: Data from the National Health Interview Survey*, ADVANCE DATA, Feb. 23, 1994, at 1, 5 (documenting a drop in public belief in a likelihood of HIV transmission from casual contact and an increase in persons who had a friend or coworker with HIV or AIDS); Teepen, *supra* (noting recent polls evidencing that the public has shed early panic about AIDS and that most people understand how the virus is transmitted and would not deny work to persons with HIV); *see also Gallup Poll Shows Rise in Compassion for Victims of AIDS*, N.Y. TIMES, Nov. 22, 1987, at 48 [hereinafter *Gallup Poll*] (revealing increased public compassion for victims of the disease and rising support for protecting HIV-positive persons against dismissal from their jobs).

Professional associations, including the American Medical Association, American Dental Association, and American Nurses Association, also opposed mandatory discharge of HIV-positive troops and supported the position that there was no public health or medical need for the ban. *See* H. REP. NO. 104-563, at 722 (1996).

44. *See, e.g.*, Lou Chibbaro Jr., *Gingrich Goes One-On-One with Magic*, WASH. BLADE, Feb. 16, 1996, at 19 (describing Earvin "Magic" Johnson's efforts to get the discharge provision repealed); Charles Krauthammer, *supra* note 43, at A19 (calling the discharge provision a "disgrace"); *This Week With David Brinkley* (ABC television broadcast, Feb. 4, 1996), *available in* LEXIS, News Library, ABCNws file (statement of George Will) (calling the HIV discharge provision "a terrible injustice").

45. Hook, *supra* note 41, at A1.

46. *See supra* notes 17–21 and accompanying text.

belief that AIDS represents a "'divine punishment for moral decline.'"[47]

II. PRESIDENT CLINTON'S DECISION: A NEW THRESHOLD FOR NON-DEFENSE

A. The President's Duty: Faithful Execution of Laws

The Constitution mandates that Congress legislate,[48] that the President faithfully execute that legislation,[49] and that the judiciary resolve disputes about the legislation's validity.[50] The President's duty to "take Care that the Laws be faithfully executed"[51] not only requires enforcement, but also implies the President's responsibility to defend the laws against attacks in court.[52]

Traditionally, courts have held that after the opportunity to veto has passed, the President cannot suspend or ignore any federal statute on the grounds that it is unconstitutional.[53] The executive branch itself has maintained a strict view of the President's constitutional duty to treat a law as valid, holding the execution of laws to be paramount.[54] The underlying rationale

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47. *Gallup Poll*, *supra* note 43, at 48 (quoting statement with which poll respondents were asked to agree or disagree).

48. *See* U.S. CONST. art. I, § 1.

49. *See id.* art. II, § 3.

50. *See id.* art. III, § 2.

51. *See id.* art. II, § 3.

52. *See* Gavett v. Alexander, 477 F. Supp. 1035, 1044 (D.D.C. 1979) (holding unconstitutional a statute section that required the Secretary of the Army to sell surplus arms at cost only to National Rifle Association members and that was not defended by the executive branch and noting that the presidential decision to decline to defend legislation interferes with the President's duty faithfully to execute laws and therefore should not be undertaken without "the weightiest of reasons"); Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 970 (1983) (asserting that the President's duty to execute laws includes defending those laws in court).

53. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."); Kendall v. United States, 37 U.S. (12 Pet.) 524, 612 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.").

54. *See* Rendition of Opinions on Constitutionality of Statutes—Federal Home Loan Bank Act, 39 Op. Att'y Gen. 11, 14 (1937) ("[T]here rarely can be proper occasion for the

for this strict standard is that, in most cases, the judiciary can be relied upon to invalidate unconstitutional laws.[55]

Despite this strong presumption that a President is required to treat a law as valid, the executive branch has long asserted the authority to decline execution of laws it deems unconstitutional.[56] Courts implicitly have approved of this authority.[57] Moreover, the constitutional framers apparently contemplated such authority.[58]

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rendition of an opinion by the Attorney General upon [a statute's] constitutionality after it has become law."); Income Tax—Salaries of President and Federal Judges, 31 Op. Att'y Gen. 475, 476 (1919) ("[W]hen an act like this . . . is passed it is the duty of the executive department to administer it until it is declared unconstitutional by the courts."); *see also* The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59 (1980) ("I do not believe that the prerogative of the Executive is to exercise free and independent judgment on constitutional questions presented by Acts of Congress.").

55. *See* 4A Op. Off. Legal Counsel 55, 59 (1980). Increased decisions by Presidents to decline to defend statutes on constitutional grounds may suggest that the judiciary cannot be relied upon as heavily to resolve constitutional disputes. The lack of clear constitutional guidelines from the Court on many issues of public debate may be, in part, the cause of more presidential decisions not to defend objectionable legislation. *See* discussion *infra* Part III.B.5.

56. Opinions dating back to at least 1860 assert the President's authority to decline to execute legislation he considers unconstitutional. *See, e.g.*, Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469–70 (1860) (asserting that the President need not enforce a statute purporting to appoint a military officer). *See generally* Presidential Authority to Decline to Execute Unconstitutional Statutes, Op. Off. Legal Counsel (Nov. 2, 1994); 4A Op. Off. Legal Counsel 55 (1980); Political Activity by State or Local Employees, 40 Op. Att'y Gen. 158 (1942).

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), was probably the first case in which the President made no effort to defend an act of Congress on constitutional grounds (noting President Jefferson's claim that the Court had no authority to decide the case at all).

57. *See, e.g.*, Freytag v. Commissioner, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (agreeing that the President has "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional"); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (rejecting President Roosevelt's assertion that a provision of the Federal Trade Commission Act was unconstitutional, but not addressing the propriety of the President's non-compliance); Myers v. United States, 272 U.S. 52 (1926) (striking down a statute as an unconstitutional limitation on presidential removal power without suggesting that the President had overstepped his authority when he declined to enforce or defend the statute, even though there was no Supreme Court precedent on point and the statute was not clearly unconstitutional); *see also* INS v. Chadha, 462 U.S. 919, 942 n.13 (1983) (noting that Presidents often sign legislation containing constitutionally objectionable provisions); *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-38 (Jackson, J., concurring) (recognizing the existence of the President's authority to act contrary to a statutory command).

58. *See* Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), *in* 8 THE WRITINGS OF THOMAS JEFFERSON, 1801–1806, at 311 n.1 (Paul Leicester Ford ed., 1897) (writing, with respect to the Alien and Sedition Laws, that "the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that

The authority to decline to execute unconstitutional statutes accommodates the conflict between the President's oath of office and the constitutional mandate that the President execute the laws. The oath of office requires the President to "preserve, protect and defend the Constitution,"[59] the "supreme Law" of the land.[60] The oath ensures that a President who signs a law is not only a participant in the legislative process but also an officer responsible for upholding the Constitution.[61]

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its coordinate branches should be checks on each other."); Statement of James Wilson on the Adoption of the Federal Constitution (Dec. 1, 1787), *reprinted in* 2 DEBATES ON THE FEDERAL CONSTITUTION 418, 445–46 (Jonathan Elliot ed., 2d ed., J.B. Lippincott 1937) (1836), *cited in* Presidential Authority to Decline to Execute Unconstitutional Statutes, Op. Off. Legal Counsel app. at vi (Nov. 2, 1994):

> [I]t is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges . . . it is their duty to pronounce it void . . . . In the same manner, the President of the United States could shield himself, and refuse to carry into effect an act that violates the Constitution.

Id. (emphasis omitted).

59. U.S. CONST. art. II, § 1, cl. 8.

60. *Id.* art. VI, cl. 2. In addition, all public officers are required to support the Constitution. *See id.* cl. 3; *see also* 5 U.S.C. § 3331 (1994) (requiring elected or appointed officials in the civil or uniformed services to swear to support and defend the Constitution).

61. *See* Op. Off. Legal Counsel 2 (Nov. 2, 1994) ("[T]he President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law."); 4A Op. Off. Legal Counsel 55, 59 (1980) (noting that in rare cases "the Executive's duty to the constitutional system may require that a statute be challenged . . . ."); General Education Provisions Act—Congress' Disapproval of Department of Education Regulations by Resolutions Not Presented to the President Is Unconstitutional, 43 Op. Att'y Gen. No. 25, at 11 (June 5, 1980):

> [T]he Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts of Congress, and cases arise in which the duty to the one precludes the duty to the other.

Id.; *see also* TERRY EASTLAND, ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY 73 (1992); Note, *supra* note 52, at 972 (noting that when the President faces a law that he believes is unconstitutional, he must decide whether the law should be executed as written and defended if attacked, or whether the duty of faithfulness to the Constitution requires its repudiation); *cf.* United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.").

In fact, even where a President fully supports legislation he has signed from a policy standpoint, commentators have maintained that, strictly speaking, only those portions that are constitutional become law. *See* EASTLAND, *supra*, at 75; *see also* John Hart Ely, United States v. Lovett: *Litigating the Separation of Powers*, 10 HARV. C.R.-C.L. L.

B. Non-Defense Distinguished from Non-Enforcement: A Lower Threshold Emerges

Although President Clinton ordered the Department of Justice not to defend the HIV provision against challenges in court,[62] he determined that he was required to enforce, or implement, the HIV provision because no court had ruled on the constitutionality of such a ban.[63] President Clinton's action elucidates an emerging distinction between the executive branch's duty to enforce a law, and its responsibility to defend a statute if it is challenged in court. The determination not to defend the HIV provision marks the executive branch's first explicit assertion that such a decision faces a different, lower threshold than a decision not to enforce legislation.

Traditionally, the executive branch has taken the position that the President should enforce a law unless Supreme Court precedent dictates that it is unconstitutional.[64] If the President believes that the Supreme Court would sustain the legislation as constitutional, he must enforce it regardless of his independent personal belief regarding the legislation's constitutionality.[65] This view finds support in case law.[66] The executive

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REV., 1, 4 (1975) (citing President Roosevelt's opinion that the provision at issue in *United States v. Lovett*, 328 U.S. 303 (1946), was unconstitutional and therefore not binding).

On the other hand, Presidents can accept a provision they believe to be unconstitutional if it advances their agenda. For example, the Reagan Administration accepted a limited congressional veto in exchange for renewed funding for the Contras. *See* Michael Strine, *Counsels to the President: The Rise of Organizational Competition*, *in* GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 257, 274 (Cornell W. Clayton ed., 1995). Such behavior raises accountability problems; where Congress and the President both agree to support an unconstitutional law, invalidation will result only from a suit brought by the public to the judiciary.

62. *See* Signing Statement, *supra* note 4, at 261.

63. *See* Quinn/Dellinger Briefing, *supra* note 35, at 3 ("And the President can decline to comply with the law, in our view, only where there is a judgment that the Supreme Court has resolved the issue.") (remarks of Assistant Attorney General Walter Dellinger); *see also id.* ("[I]n circumstances where you don't have the benefit of such a prior judicial holding, it's appropriate and necessary to enforce [a statute].") (remarks of White House Counsel Jack Quinn).

64. *See* Quinn/Dellinger Briefing, *supra* note 35, at 3.

65. *See, e.g.*, Op. Off. Legal Counsel 2 (Nov. 2, 1994).

66. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38, 647 (1952) (Jackson, J., concurring) (stating that a court may sustain presidential action in contravention of a legislative mandate "only by disabling the Congress from acting upon the subject" (citing Myers v. United States, 272 U.S. 52 (1926)), and refusing to rely on

branch has, however, advanced two circumstances under which the President may sign legislation containing desirable provisions yet refuse to defend an element of the legislation that the President believes is constitutionally deficient.[67] First, the

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"unadjudicated claims of power"); *see also* Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1121 (9th Cir. 1988) (determining that the prevailing party was entitled to attorneys' fees because the executive branch acted in bad faith in refusing to execute provisions of the Competition in Contracting Act and stating that the President's action was "utterly at odds with the texture and plain language of the Constitution, and with nearly two centuries of judicial precedent"), *withdrawn in part*, 893 F.2d 205, 208 (9th Cir. 1990) (en banc) (ruling that Lear Siegler was not a prevailing party and therefore withdrawing a section of the opinion quoted above).

Presidents have declined to enforce legislation in situations where no court had decided the constitutional issue involved, and courts did not criticize this decision in subsequent litigation. *See, e.g.*, *Myers*, 272 U.S. at 52. *Myers* involved President Woodrow Wilson's refusal to enforce a statute that prevented him from removing postmasters without obtaining Senate approval. President Wilson did not enforce the legislation despite the fact that the statute was not manifestly unconstitutional, and there was no relevant Supreme Court precedent. *See id.* at 107. The Court ultimately struck down the *Myers* statute as an unconstitutional limitation on the President's removal power, but no member of the Court suggested that Wilson overstepped his constitutional authority, or even acted improperly, by refusing to comply with a statute that he believed was unconstitutional. *See id.* at 176; *see also* Op. Off. Legal Counsel 3–4 (Nov. 2, 1994) (arguing that "[t]he Court in *Myers* can be seen to have implicitly vindicated the view that the President may refuse to comply with a statute that limits his constitutional powers if he believes it is unconstitutional"). *But cf. Lear Siegler, Inc.*, 842 F.2d at 1121-22 n.14 (rejecting the executive branch's argument that because the Court did not criticize the propriety of presidential non-enforcement in *Myers*, 272 U.S. at 52, and in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court tacitly approved of those actions).

67. Where Presidents have declined to enforce a statute, they have also declined to defend it. *See, e.g.*, *Humphrey's Ex'r*, 295 U.S. at 602; *Myers*, 272 U.S. at 52. There are no instances where Presidents have not enforced, yet have defended, legislation.

The executive branch also has argued against the constitutionality of a statute in court where either there was no occasion for the executive branch to enforce or implement the statute before litigation or where the statute did not provide for any executive branch implementation. *See, e.g.*, Hechinger v. Metropolitan Wash. Airports Auth., 845 F. Supp. 902, 904 (D.D.C.) (noting that the United States filed a statement of interest in which it challenged the constitutionality of a board established by federal statute), *aff'd*, 36 F.3d 97 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995); Synar v. United States, 626 F. Supp. 1374, 1379 (D.D.C.) (noting the position of the United States "that the [Gramm-Rudman-Hollings] Act does not unconstitutionally delegate legislative authority but that the role of the Comptroller General in the automatic deficit reduction process violates the principle of separation of powers"), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986); *In re* Benny, 44 B.R. 581, 583 (N.D. Cal. 1984) (noting that the United States filed intervention papers challenging the constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984), *aff'd*, 812 F.2d 1133 (9th Cir. 1987).

That the HIV provision required the executive branch to *do* something, namely, discharge HIV-positive servicemembers, arguably bolsters the justification for the President's decision not to defend legislation. Where legislation requires affirmative action by the executive branch, executive branch analysis—and approval—of the legislation's constitutionality should be stricter than in cases where the executive branch is not required to carry out action in accordance with the legislation.

President may decline to defend statutes that, in his opinion, unconstitutionally encroach on the authority or powers of the presidency.[68] Second, the executive branch has asserted that it is not required to defend statutes that are "clearly" or "patently" unconstitutional.[69] When the President declines to defend

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68. *See* Op. Off. Legal Counsel 3 (Nov. 2, 1994); 39 Op. Att'y Gen. 11, 16 (1937); Department of Justice Press Release, Attorney General William French Smith (May 6, 1982) [hereinafter Smith Press Release] ("[T]he Department of Justice has the responsibility to defend acts of Congress unless they intrude on executive powers or are clearly unconstitutional."); *see also* 4A Op. Off. Legal Counsel 55, 56 (1980).

Specific examples of presidential refusal to defend legislation on these grounds can be found in *Morrison v. Olson*, 487 U.S. 654, 693–96 (1988), and *INS v. Chadha*, 462 U.S. 919 (1983).

The President may have more latitude to refuse to defend provisions that encroach on the President's constitutional powers than to refuse to defend statutes on other grounds because "it is well understood that the best way to reach a constitutional equilibrium in this area is for each branch to vigorously enforce its own interests." John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 388–89 n.44 (1993) [hereinafter McGinnis, *Models of the Opinion Function*]; *see* Op. Off. Legal Counsel 3 (Nov. 2, 1994); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 313 (1993) ("The judiciary would lose a measure of its most prized prerogative, the protection of individual constitutional rights, if the executive were to refuse to enforce provisions that violate individual rights as freely as it refuses to enforce provisions that violate the separation of powers.").

Thus, the president may be on stronger legal ground in refusing to execute laws that encroach on his authority rather than relying on another stated rationale. Where he declines to enforce on a different basis he may be, however, more honest to the political issue at stake. The increased "lawyerization" of political disputes frequently submerges the real disputes about substantive choices beneath distracting contests over abstract separation of powers principles. *See* Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 85.

69. *See 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. 10 (1976) [hereinafter *Congressional Interests Hearings*] (statement of Rex Lee, Assistant Attorney General) ("[T]he Department will not defend against a claim of unconstitutionality . . . where the Attorney General believes, not only personally as a matter of conscience, but also in his official capacity as the Chief Legal Officer of the United States, that a law is *so patently unconstitutional* that it cannot be defended." (emphasis added)); *accord* 4A Op. Off. Legal Counsel 55 (1980); Smith Press Release, *supra* note 68 ("[T]he Department of Justice has the responsibility to defend acts of Congress unless they intrude on executive powers or are *clearly unconstitutional* . . . ." (emphasis added)). *Webster's Dictionary* defines "patently" as "clearly," "obviously," or "plainly." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1654 (1986). *Roget's Thesaurus* suggests "undeniable," "unmistakable," and "incontrovertible" as synonyms for the adjective "patent." ROGET'S THESAURUS 489 (Doubleday 1977).

When faced with presidential decisions to decline to defend legislation, courts have not acknowledged any impropriety in the President's actions and have confirmed the constitutionality of his conclusion. *See* discussion *infra* Part II.B.

Courts have supported explicitly state attorneys general who have asserted this authority. *See e.g.*, Delchamps, Inc. v. Alabama State Milk Control Bd., 324 F. Supp. 117 (D. Ala. 1971) (holding that the Alabama attorney general was not under a duty to defend statute he believed was unconstitutional).

statutes that violate individual constitutional liberties, as the HIV provision is alleged to do, he faces this "patently" unconstitutional standard.[70] Yet, in cases involving individual constitutional rights, Supreme Court guidance is often limited.[71] Thus, the line distinguishing whether legislation will be deemed constitutional or "patently" unconstitutional proves difficult to draw. A review of prior instances of presidential non-defense of statutes provides some, albeit insufficient, guidance.

Before 1977, the executive branch enforced, but did not defend, legislation infringing on individual constitutional rights in only two instances.[72] In *United States v. Lovett*,[73] the Supreme Court addressed the constitutionality of a provision, inserted in an appropriations bill, which singled out certain federal employees as dangerous and unfit for government service and withheld their salaries.[74] President Franklin Roosevelt signed the bill because it appropriated wartime defense funds that he believed were imperative.[75] Although he enforced the statute, President Roosevelt declined to defend it in court because he believed the provision was unconstitutional.[76] Congress authorized a special counsel to defend the statute as amicus curiae.[77] The Supreme Court unanimously affirmed the President's belief, holding that the provision was an unconstitutional bill of attainder.[78] Furthermore, no Justice

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70. There appear to be no court adjudications of a President's decision not to enforce or implement legislation on the grounds that individual constitutional liberties would be violated. The executive branch, however, has asserted that it possesses the authority to decline to enforce legislation on these grounds. *See* Op. Off. Legal Counsel 2–3 (Nov. 2, 1994) (stating that presidential determination as to whether to comply with a provision should be reached "after careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals").

71. *See* discussion *infra* Part III.B.5.

72. *See* United States v. Lovett, 328 U.S. 303, 306 (1946); Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). These cases are distinguished from instances of presidential non-defense asserted on separation of powers grounds.

73. 328 U.S. 303 (1946).

74. *See id.* at 305, 308–12.

75. *See id.* at 305 n.1. Upon signing the bill, President Roosevelt stated, "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional." *Id.* at 313 (citation omitted).

76. *See id.* at 305 n.1. A majority of the Senate also believed that the statute was unconstitutional, but passed the bill "only because it was a rider to a necessary appropriations bill and after several conferences the House refused to recede." *Congressional Interests Hearings*, *supra* note 69, at 10 (statement of Rex Lee).

77. *See Lovett*, 328 U.S. at 306.

78. *See id.* at 315.

suggested that the President had overstepped his authority, or even acted improperly, by refusing to defend the statute.

In 1963, President John F. Kennedy enforced, but declined to defend, a separate-but-equal provision of a law that provided federal funding for racially segregated hospitals.[79] The Court of Appeals for the Fourth Circuit struck down the provision.[80] The Supreme Court previously had "settled beyond question" that the validity of state-supported racial discrimination was "foreclosed as a litigable issue."[81]

The decisions not to defend legislation in these two early cases evince inconsistent standards for assessing the propriety of presidential non-defense of a statute. *Simkins* promotes a standard for non-defense equal to the standard for non-enforcement: there must be existing Supreme Court precedent on the constitutional issue before a President may decline to defend legislation. *Lovett* implies that non-defense may be appropriate where the constitutionality of a statute is not a matter of clear, settled law. *Lovett* therefore promotes a lower threshold for presidential non-defense of statutes.[82] Significantly, President Clinton relied upon *Lovett* in making his determination to decline to defend the HIV provision.[83]

More recent case law supports the standard employed by the executive branch in *Lovett*: presidential non-defense is warranted even if there is not a relevant constitutional issue.[84]

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79. *See* Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959, 962 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

80. *See id.* at 969.

81. Bailey v. Patterson, 369 U.S. 31, 33 (1962) (per curiam) (vacating and remanding for "expeditious disposition" of black plaintiff's rights to non-segregated transportation service).

82. The *Simkins* standard conforms more easily to the plain meaning of the term "patently" unconstitutional. *See* discussion *supra* note 69; *cf.* Arthur S. Miller & Jeffrey H. Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51, 58 (1979) ("It is one thing for the Department of Justice to attack a statute when all, including Congress, can see that the statute is invalid; and quite another to do so when the essence of the dispute lies between the President and Congress.").

83. See Quinn/Dellinger Briefing, *supra* note 35, at 4–5 (citing President Roosevelt's action as precedent); *cf.* Signing Statement, *supra* note 4, at 261 (citing President Roosevelt's decision to sign the funding bill at issue in *Lovett* despite his objection to a provision that infringed upon individual rights).

84. Since 1977, there have been a number of instances in which the executive branch has declined to defend, but at the same time has enforced, federal legislation it asserts is unconstitutional. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 560, 576 (1990) (complying with a statute forbidding review of or changes to FCC minority ownership policies, but questioning whether the existing preference policies violated the Equal Protection Clause), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S.

For example, in *League of Women Voters v. FCC*,[85] the Justice Department declined to defend the Public Broadcasting Act of 1967, which prohibited noncommercial television licensees from editorializing, endorsing, or opposing candidates for public office.[86] The executive branch declined to defend the statute,[87] asserting that the prohibition violated the First Amendment and that "reasonable" arguments could not be advanced to defend the legislation against constitutional challenge.[88] Despite

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Ct. 2097, 2111 (1995); League of Women Voters v. FCC, 489 F. Supp. 517, 520–21 (C. Cal. 1980) (refusing to defend provisions of the Public Broadcasting Act of 1967, 47 U.S.C. § 399 (1982)), *amended by* 47 U.S.C. § 399 (1988), that prohibited certain speech, but enforcing the statute to provoke "test litigation"), *aff'd*, 468 U.S. 364 (1984); Gavett v. Alexander, 477 F. Supp. 1035, 1043–44, 1051 (D.D.C. 1979) (enforcing a statute permitting the sale of surplus rifles at cost to NRA members only, but declining to defend it on the grounds that it violated the Equal Protection Clause).

The executive branch also declined to defend a provision of the Social Security Act that allowed a wife, but not a husband, of a disabled wage earner with children to receive special benefits, 42 U.S.C. § 402(e) (1976), in a series of cases. *See* Vitale v. Harris, 507 F. Supp. 854 (S.D. Fla. 1981); Ambrose v. Califano, No. 79-52 (D. Or. July 17, 1980); Yates v. Califano, 471 F. Supp. 84 (W.D. Ky. 1979). These cases, however, may provide support for the "settled beyond question" threshold suggested by *Simkins*: the Supreme Court had already held the statutory scheme concerned unconstitutional. *See* Califano v. Goldfarb, 430 U.S. 199, 216–17 (1977).

In *Turner Broadcasting System, Inc. v. FCC*, the executive branch complied with the "must-carry" provisions of a cable broadcasting act, passed by Congress over President Bush's veto on constitutional grounds, but refused to defend the provisions in court. The Clinton Administration subsequently defended the provisions, and the courts validated their constitutionality. *See* 810 F. Supp. 1308 (D.D.C. 1992), *enforced*, 819 F. Supp. 32 (D.D.C. 1993), *vacated*, 114 S. Ct. 2445 (1994), *aff'd on reh'g*, 910 F. Supp. 734 (D.D.C. 1995), *cert. granted*, 116 S. Ct. 907 (1996).

85. 489 F. Supp. 517 (C.D. Cal. 1980).

86. *See id.* at 520–21.

87. After the Justice Department declined to defend the statute, the Senate appeared as amicus curiae at the district court level and argued that the suit should be dismissed because the FCC agreed with the opposing party that the statute was unconstitutional. *See id.* at 518. The district court granted the motion to dismiss on the grounds of lack of adverse parties and ripeness, because it determined that the FCC was unlikely to penalize the plaintiff. *See id.* at 520–21. The court did not remark on the propriety of the non-defense decision, but stressing the need for adverse parties, it stated:

> It is not without consequence that the decision not to argue in favor of the statute is being made by the Executive Branch. That fact colors the litigation in that a conflict between the Legislative and Executive branches is presented by the passage of the statute by the one and the decision by the other to acquiesce in a declaration that the statute is unconstitutional. Hence this suit is flavored by a *sub silentio* prayer by the Executive branch for action by the Judicial branch that it cannot take itself.

Id. at 520–21.

88. *See* Letter from Benjamin Civiletti, Assistant Attorney General, to Michael Davidson, Senate Legal Counsel (Oct. 11, 1979) (on file with Senate Legal Counsel); *see also* Letter from William F. Smith, Attorney General, to Senators Strom Thurmond and

the executive branch's assertion in *League of Women Voters* that no "reasonable" arguments could be advanced to defend the statute, the Administration appeared to have been aware of strong constitutional arguments in support of the statute.[89] The statute was not therefore "patently" unconstitutional in accordance with the "foreclosed as litigable" standard employed in *Simkins*.[90] Rather, facing no clear guidance from Supreme Court case law as to the constitutionality of the statute and recognizing that arguments existed on both sides of the dispute, the White House determined its position using policy goals and political agenda to inform its determination.[91] The Supreme Court ultimately held that the statute violated the First Amendment.[92]

Subsequent statements by executive branch officials provide support for requiring a less stringent constitutional evaluation by the executive branch before it decides not to defend legislation. According to these officials, a President may decline to defend a statute where no "respectable" argument can be advanced in its support.[93]

Joseph Biden (Apr. 6, 1981) ("In my view, the Department has the duty to defend an Act of Congress whenever a *reasonable argument* can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts."), *quoted in* Note, *supra* note 52, at 976 n.21.

In *Gavett*, the executive branch also asserted that "reasonable" arguments could not be advanced in defense of the statute. *See* 477 F. Supp. at 1044. Citing *Simkins*, 323 F.2d at 962, the court noted that on rare occasions the executive branch has declined to defend laws it considers unconstitutional, and that "while such a determination is not binding upon the Court, it constitutes a significant circumstance which should be accorded some weight." 477 F. Supp. at 1044.

89. *See DOJ Authorization and Oversight, 1981: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong. 855 (1980); Publication of a Notice from the Senate Legal Counsel, 125 CONG. REC. 35,416 (1979). For a discussion of the arguments in support of the statute, see Note, *supra* note 52, at 975 n.18.

90. *See* Note, *supra* note 52, at 976 (asserting this view); *see also supra* notes 80–81 and accompanying text.

91. *See* Note, *supra* note 52, at 976 (arguing that the executive branch decision not to defend the statute at issue in *League of Women Voters* was made for political reasons); *see also infra* note 168 and accompanying text.

92. *See* FCC v. League of Women Voters, 468 U.S. 364 (1984).

93. *See, e.g.*, *Congressional Interests Hearings*, *supra* note 69, at 151 (urging that the executive branch should defend statutes unless "'no respectable argument'" is available (testimony of Simon Lazarus) (quoting Robert L. Stern, Solicitor General's Office)); *see also* Drew S. Days III, Ninth Judge Mac Swinford Lecture delivered at the University of Kentucky College of Law, *In Search of the Solicitor General's Clients: A Drama with Many Characteristics*, (Nov. 10, 1994), *in* 83 KY. L.J. 485, 499–500 & n.71 (1994–95) (arguing that non-defense may be appropriate where "no professionally respectable argument can be made in defense of the statute" (quoting Joshua I. Schwartz, *Two Perspectives on the Solicitor General's Independence*, 21 LOY. L.A. L. REV. 1119, 1153–54 (1988))).

C. Constitutionality of the HIV Ban: Arguments on Both Sides

As the discussion in Part II.B reveals, a review of previous application of the "patently" unconstitutional standard provides insufficient guidance as to what level of uncertainty vis-à-vis the constitutionality of a statute is sufficient before the President may decline to defend it in court. The more recent examples of presidential non-defense of legislation suggest that where existing case law does not speak directly to the issue, and "reasonable" arguments in support of the legislation cannot be countenanced, a President may decline to defend the legislation. Under these circumstances, a President may take the position he deems most "respectable." What is considered unconstitutional then is determined, in effect, by the position that best promotes a President's policy concerns or political agenda. To determine whether President Clinton's decision to decline to defend the HIV ban reflects this standard, an inquiry into the arguments on both sides of the constitutionality of the HIV provision is appropriate.

1. Arguments in Defense of Constitutionality—Congress could have asserted a number of strong arguments in support of the HIV ban:

Judicial Deference to Congress. The Constitution bestows upon Congress responsibility for establishing regulations governing the armed forces.[94] Courts give Congress the highest degree of deference in carrying out this responsibility.[95]

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94. *See* U.S. CONST. art I, § 8, cl. 14.

95. *See* Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("[J]udicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."), *quoted in* Weiss v. United States, 510 U.S. 163, 177 (1994); *see also* Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc) (deferring to Congress in upholding the military "Don't Ask, Don't Tell" policy).

In fact, courts have held that the judiciary has the least competence to review military regulations. *See Rostker*, 453 U.S. at 65 ("Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked."); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence.").

Where judicial deference to Congress as regulator of military affairs conflicts with judicial deference to the President as Commander in Chief, congressional interests trump. *See, e.g., Rostker*, 453 U.S. at 57. In *Rostker*, the Court rejected an equal protection claim by men who challenged a statute precluding draft registration of

Judicial deference to Congress with respect to military affairs extends to areas where the constitutional rights of individual servicemembers are implicated.[96] Although this deference does not mean that the statute in question escapes judicial scrutiny, or that courts are free to overlook constitutional deficiencies, an equal protection challenge must be evaluated in the special context of military affairs.[97] In determining whether a constitutional violation has occurred, a court must consider whether the factors weighing in favor of the right are "so extraordinarily weighty as to overcome the balance struck by Congress."[98]

Rational Basis Review. The HIV provision is subject to the rational basis standard of review because an HIV-positive classification is not suspect and does not burden fundamental rights.[99] Heightened scrutiny is not applied to legislation that

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women. The Court was not persuaded by the plaintiffs' argument that weight should be given to President Carter's recommendation to Congress that women be included in the draft registration. *See id.* at 60–61. *Rostker*, however, is distinguishable from the HIV provision situation because in *Rostker*, notwithstanding his recommendation to the contrary, President Carter accepted Congress' conclusion that women should not be made to register, and the Department of Justice defended the statute in court. *See id.* at 61.

96. *See Weiss*, 510 U.S. at 177 (" '[W]e have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated.' " (quoting Solorio v. United States, 483 U.S. 435, 447–48 (1987))); Chappell v. Wallace, 462 U.S. 296 (1983) (rejecting a claim for damages arising from equal protection violations by military officials because Congress has not provided for such a remedy); *Rostker*, 453 U.S. at 57 (rejecting an equal protection challenge on grounds of judicial deference to Congress' decision to require only men to register for the draft).

97. *See Weiss*, 510 U.S. at 176–77 ("Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs . . . . But in determining what process is due, courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.' " (citations omitted)); *Rostker*, 453 U.S. at 67:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause . . . but the tests and limitations to be applied may differ because of the military context.

Id. (citations omitted); *Thomasson*, 80 F.3d at 927 (noting that special status of the military means that constitutional challenges to military personnel policies face heavy burdens).

98. *Weiss*, 510 U.S. at 177–78 (reiterating the test employed in *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)).

99. *See* Romer v. Evans, 116 S. Ct. 1620, 1627 (1996) (stating that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end" (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993))); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985):

makes classifications based upon disabilities,[100] including HIV.[101] Moreover, respect for separation of powers principles should make courts reluctant to apply heightened scrutiny to legislative choices and thereby establish new suspect classes.[102] Furthermore, courts should be even more reluctant to employ heightened scrutiny when the resulting judicial review would be applied to the special area of military affairs.[103]

Courts should sustain a law under rational basis review if it can be said to advance a legitimate government interest, "even

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> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Id. at 441–42.

To the extent that *Romer* provides justification for or against President Clinton's determination that the statute was unconstitutional, it should be noted that *Romer* was decided on May 20, 1996, *after* President Clinton decided not to defend the HIV ban. *See Romer*, 116 S. Ct. at 1620.

100. *See Heller*, 509 U.S. at 321 (stating that no special standard of rational basis review is necessary in cases of mental retardation or mental illness); *see also City of Cleburne*, 473 U.S. at 442 (holding that mental retardation is not "a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation").

101. *See* Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1267 (4th Cir. 1995) (rejecting heightened scrutiny standard of review for claim brought by HIV-positive health care worker and stating that "[c]lassifications involving individuals with disabilities are subject only to rational basis scrutiny"); *see also* Leckelt v. Board of Comm'rs, 909 F.2d 820, 831 (5th Cir. 1990); Doe v. Marsh, No. 89-1383-OG, 1990 U.S. Dist. LEXIS 1442, at *16 (D.D.C. Feb. 8, 1990) ("In order to state a valid equal protection claim, [an HIV-positive servicemember] must show that his differential treatment on account of his HIV positive status is not rationally related to a legitimate government interest." (citing *City of Cleburne*, 473 U.S. at 440)).

Persons with HIV/AIDS are considered among the protected class of people with disabilities for purposes of the Americans with Disabilities Act, 42 U.S.C. § 12,102(2) (1995); *see* Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1321 (E.D. Pa. 1994). The military is exempt from federal disability law. *See, e.g.*, Roper v. Department of the Army, 832 F.2d 247 (2d Cir. 1987); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987); Gonzales v. Department of the Army, 718 F.2d 926 (9th Cir. 1983); *Marsh*, 1990 U.S. Dist. LEXIS 1442, at *14 (applying military exemption to reject claims brought by HIV-positive servicemember under the Rehabilitation Act and Title VII).

102. *See City of Cleburne*, 473 U.S. at 441–42.

103. *See* Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (en banc) (citing Parker v. Levy, 417 U.S. 733, 743 (1974)); *see also* Charles v. Rice, 28 F.3d 1312 (1st Cir. 1994) (rejecting equal protection claim brought by HIV-positive national guardsman challenging regulation that resulted in his discharge as unlawfully discriminating on the basis of handicap); *Marsh*, 1990 U.S. Dist. LEXIS 1442, at *18 (rejecting an equal protection claim brought by an HIV-positive army enlistee challenging the policy that prevents servicemembers with HIV from attending training programs in order to change their area of specialty).

if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[104] The HIV provision should have been entitled to a strong presumption of validity and sustained if there was "any reasonably conceivable state of facts that could provide a rational basis for the classification."[105] Under rational basis review, no actual legislative factfinding or empirical evidence is necessary to sustain the statute's validity.[106]

The discharge policy was related rationally to Congress' legitimate goal of achieving military readiness. The HIV provision reflected a legislative conclusion that HIV-positive servicemembers hinder military readiness because they are not deployable. Servicemembers with HIV may be singled out from other non-deployable servicemembers with chronic medical conditions because of the risk of transmission of the virus and their inability to contribute to the military blood supply.[107]

Violation of Military Law. There is a rational basis on which to conclude that servicemembers with HIV likely contracted the virus through drug use or same-sex sexual conduct[108] in violation of the Uniform Code of Military Justice.[109] Congress can set military personnel policies to punish unsatisfactory conduct without running afoul of the Equal Protection Clause.[110]

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104. *Romer*, 116 S. Ct. at 1627; *see also* FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) (rational basis equal protection review does not allow courts to judge the "wisdom, fairness or logic of legislative choices").

105. *Heller*, 509 U.S. at 319–20 (quoting *Beach Communications*, 508 U.S. at 313).

106. *See id.*, 509 U.S. at 320 (" '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' " (quoting *Beach Communications*, 508 U.S. at 315)); *see also Thomasson*, 80 F.3d at 928 ("To sustain the validity of its policy, the government is not required to provide empirical evidence.").

107. *See Marsh*, 1990 U.S. Dist. LEXIS 1442, at *16 (accepting as rational the reasons for an army policy restricting opportunities to HIV-positive servicemembers, including safety concerns and the risk of transmission to other servicemembers.

108. *See* 142 CONG. REC. H8823 (daily ed. July 30, 1996) (statement of Rep. Dornan) (noting that, according to U.S. Marine Corps officials, of the 56 marines who have tested positive for HIV, none became infected through tainted transfusions or blood or tissue products and concluding that transmission therefore had occurred through sex with prostitutes, same-sex sexual conduct, and drug use); *cf. Thomasson*, 80 F.3d at 930 (concluding that "the legislature was certainly entitled to presume that a servicemember who declares that he is gay has a propensity to engage in homosexual acts").

109. 10 U.S.C. § 912a (1994) (prohibiting drug use); *id.* § 925 (prohibiting sodomy); *id.* § 934 (prohibiting any criminal offense).

110. *See* Greer v. Spock, 424 U.S. 828, 840 (1975) ("There is nothing in the Constitution that disables a military from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the based under his command."); *Thomasson*, 80 F.3d at 929 ("No constitutional constraint prohibits the military from preventing acts that would threaten combat capability.").

Discriminatory Animus Not Conclusive. Even if Representative Dornan's remarks reflect a discriminatory animus toward HIV-positive servicemembers, it does not follow necessarily that his remarks motivated others in Congress to enact the provision.[111] Even if the provision was adopted out of discriminatory animus toward servicemembers infected with HIV, that is not a sufficient cause to invalidate the statute where other legitimate, rational grounds for the ban exist.[112]

2. Arguments Attacking the Constitutionality of the HIV Ban—The executive branch also could have asserted strong arguments attacking the constitutionality of the statute as follows:

Joint Authority for Military Affairs. The Constitution assigns the conduct of military affairs to both the legislative and executive branches.[113] Military policy choices should be evaluated jointly by Congress and the executive branch.[114] Established congressional practice is to develop a change in military policy in conjunction with the executive branch.[115] In this way, restrictions on military personnel will reflect professional military judgments as to which personnel contribute to military combat effectiveness.[116] The HIV discharge provision was not developed

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111. *See* United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . .").

112. *Cf.* Palmer v. Thompson, 403 U.S. 217, 226–27 (1971) (refusing to strike down a city policy closing swimming pools despite evidence that the policy was motivated by discriminatory animus against African-Americans because other legitimate reasons for the policy existed); *O'Brien*, 391 U.S. at 383 (refusing to prohibit enforcement of statute proscribing burning of draft cards because Congress allegedly passed the law to stifle dissent in violation of the First Amendment).

113. *See* U.S. CONST. art. I, § 8, cl. 14 (dictating that Congress regulates the armed forces); *id.* art. II, § 2, cl. 1 (dictating that the President is the Commander in Chief); *Thomasson*, 80 F.3d at 924 ("The Constitution assigns the conduct of military affairs to the Legislative and Executive branches. . . . [T]he governance of military affairs is a shared responsibility of Congress and the President.").

114. *Cf.* Rostker v. Goldberg, 453 U.S. 57, 79 (1981) ("The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration . . . ."); *Thomasson*, 80 F.3d at 926 ("[T]he imprimatur of the President, the Congress, or both imparts a degree of legitimacy to military decisions that courts cannot hope to confer."). The Department of Justice defended the policies at issue in *Rostker* and *Thomasson* in court after initially opposing them at the deliberation stage. *See Rostker*, 453 U.S. at 60–61; *Thomasson*, 80 F.3d at 921–22.

115. *See* 142 CONG. REC. S2294 (daily ed. Mar. 19, 1996) (statement of Sen. Nunn) (criticizing Congress' lack of deliberative process with regard to the HIV ban as deviant from the norm).

116. *See* Hon. Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 559 (1994).

jointly by executive branch or military officials together with Congress.[117] The military readiness rationale was formed without any input from the military or executive branch.[118] Where a proposed change in military policy is controversial, evaluation by both branches is even more imperative in order to ensure acceptance of the policies within the military and prevent societal division.[119]

Judicial Deference Not Appropriate. With regard to military issues, courts generally defer to congressional decisions, relying on the joint evaluation between Congress and the executive branch to produce appropriate legislation.[120] Such deference assumes that military leaders have participated in the policy-making process.[121] The ban on HIV-positive servicemembers was not a decision that reflected any input from military leaders.[122] In fact, Congress did not consult with top military leaders, who actually opposed the ban and viewed it as unnecessary and unfair.[123] The Secretary of Defense and the Chairman of the Joint Chiefs of Staff both opposed the ban because they believed it hindered military readiness.[124]

Furthermore, judicial deference to congressional decision-making on military legislation is warranted only if the legislation results from *careful* evaluation by Congress.[125] The

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117. Military leaders and executive branch officials opposed the ban. *See* discussion *supra* Part I.A.

118. *See* 142 CONG. REC. S2294 (daily ed. Mar. 19, 1996) (statement of Sen. Nunn). *See generally* discussion *supra* Part I.A.

119. *See Thomasson*, 80 F.3d at 926 (stating that where opposition is likely, "the fact that the change emanates from the political branches minimizes both the likelihood of resistance in the military and the probability of prolonged societal division").

120. *See Thomasson*, 80 F.3d at 923 (deferring to lengthy legislative process resulting in a compromise policy between Congress, the executive branch, and the military regarding gays in the military where the statute "embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiation and deliberation").

121. *See id.* at 926 ("Parallel to the deference owed Congressional and Presidential policies is deference to the decision-making authority of military personnel who 'have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy.' " (quoting Goldman v. Weinberger, 475 U.S. 503, 508 (1986))); *see also Goldman*, 475 U.S. at 507 ("[C]ourts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."); *A Law Not Worth Defending*, ROCKY MTN. NEWS, Feb. 14, 1996, at 47A ("The Supreme Court gives wide berth to the military to set its own rules.").

122. *See* discussion *supra* Part I.A.

123. *See* DOD/Joint Chiefs Statement, *supra* note 8.

124. *See* Letter from William Perry, Secretary of Defense, to Representative Thomas A. Daschle, *supra* note 21; *see also* DOD/Joint Chiefs Statement, *supra* note 8.

125. *See* Rostker v. Goldberg, 453 U.S. 57, 71–72 (1981) (deferring to Congress where extensive consideration in hearings, during floor debate, and in committee made

attitudes expressed by Representative Dornan, and the absence of alternative explanations in the record, as well as the lack of hearings, debate, committee discussion, and the failure to obtain input from the executive branch and military leaders[126] all belie any suggestion that Congress acted with requisite care.

While courts have tended to provide more limited review of Congress' determination of military personnel policies because of Congress' constitutional authority in this area,[127] the special military context does not allow Congress "to disregard the Constitution when it acts in the area of military affairs."[128] Judicial deference requires consideration of the constitutional rights at stake.[129] Typically, Congress "carefully assesses the military necessity for any difference in treatment, and gives careful consideration to a wide range of views."[130] Where Congress has not given due consideration to the constitutional problems of a particular piece of legislation and has approved it without full awareness of those problems, the President's obligation to defend it is mitigated.[131] The interests of national security implicit in the goal of military readiness should not be allowed to weaken domestic security.[132]

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it "apparent that Congress was fully aware not merely of the many facts and figures presented to it by witnesses who testified before its Committees, but of the current thinking as to the place of [the affected group] in the Armed Services"); *see also* Weiss v. United States, 510 U.S. 163, 177 (1994) (" 'Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.' " (quoting Solorio v. United States, 483 U.S. 435, 447 (1987))); *Thomasson*, 80 F.3d at 925 (" 'Congress, working with the Executive Branch, has developed a system of military . . . law that carefully balances the rights of individual servicemembers and the needs of the armed forces.' " (quoting Nunn, *supra* note 116, at 566)).

126. *See* discussion *supra* Part I.A.

127. *See* U.S. CONST. art I, § 8; *Solorio*, 483 U.S. at 447–48; *Rostker*, 453 U.S. at 68–70; Middendorf v. Henry, 425 U.S. 25, 43 (1976).

128. *Rostker*, 453 U.S. at 67; *see also* Nunn, *supra* note 116, at 565 (noting that members of Congress are mindful of their duty to consider the constitutional rights of servicemembers when dealing with military affairs).

129. *See Rostker*, 453 U.S. at 64 ("The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality."); *Thomasson*, 80 F.3d at 945 (Luttig, J., concurring) (stating that congressional "commands" should not be interfered with by "unelected officials" where Congress "explicitly considered, at length, the constitutional validity of its action").

130. Nunn, *supra* note 116, at 565 n.32 (noting as an example of this typical behavior the careful process used by Congress in developing the "Don't Ask Don't Tell" policy on gays and lesbians in the military).

131. *See* Geoffrey P. Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35, 59 (1993).

132. *See* United States v. Robel, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those

Heightened Scrutiny Appropriate. The HIV provision should be subject to a heightened level of scrutiny. First, while courts generally have held that classifications based on disability should receive only rational basis review,[133] the passage of the Americans with Disabilities Act[134] (ADA) reflects an attempt by Congress to mandate a higher level of scrutiny for classifications based on disability.[135] Since the ADA's passage in 1990,[136] the Supreme Court has not addressed the question of whether persons with disabilities now constitute a suspect class.[137] Several lower courts have used the ADA as a guide to interpreting federal and state law, however, and have determined that persons with disabilities are entitled to special constitutional protection.[138]

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liberties . . . which makes the defense of the Nation worthwhile."); *Thomasson*, 80 F.3d at 949 (Hall, J., dissenting) ("Aside from cheapening our national values, a broad 'military exception' from the Constitution in the interest of defending us from foreign danger could transform the military into a domestic danger.").

133. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985); Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1267 (4th Cir. 1995) ("Classifications involving individuals with disabilities are subject only to rational basis scrutiny."); Spragens v. Shalala, 36 F.3d 947, 950 (10th Cir. 1994) (applying a rational basis standard to a classification involving blind persons), *cert. denied*, 115 S. Ct. 1399 (1995); Association of E. Pa., Inc. v. City of Phila., 6 F.3d 990, 1001 (3d Cir. 1993) (stating that rational basis is the correct standard of review for a classification of business owners with disabilities and that the ADA did not overrule *City of Cleburne*), *cert. denied*, No. 96-899, 1996 WL 723348 (U.S. Feb. 18, 1997).

The Supreme Court has not addressed yet an equal protection claim in the context of HIV discrimination. The Court has stated that Congress should be granted greater deference where it has legislated on behalf of persons with mental retardation because retardation presents a range of "difficult" and "technical" matters that the legislature is most qualified to address. *See City of Cleburne*, 473 U.S. at 442–43. Yet, the same may not be true for other disabilities. *See* Chai R. Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 259–76 (1996) (questioning *City of Cleburne*'s application in subsequent decisions, which would require rational basis review for all disabilities). One could argue that the barriers to opportunity, which are bolstered by conscious and unconscious stereotypes, should be eradicated for people with disabilities just as for women and racial minorities. *See, e.g.*, Chai R. Feldblum, *Antidiscrimination Requirement of the ADA*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 35 (Lawrence O. Gostin et al. eds., 1993).

134. 42 U.S.C. §§ 12,101–12,213 (1994).

135. *See* Lisa A. Montanaro, Comment, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621, 647–52 (1995) (discussing cases in which federal courts have used the ADA as a means for holding that the disabled are entitled to "special protection or solace from the courts").

136. Pub. L. No. 101-336, 104 Stat. 327 (1990).

137. The Court denied certiorari in January 1994, in a case that presented the issue of whether mentally ill persons, a subgroup of the disabled, are a suspect class. *See* Ibarra v. Duc Van Le, 114 S. Ct. 918 (1994); *see also* Heller v. Doe, 509 U.S. 312, 319 (1993) (declining to address the issue of whether mentally retarded persons constitute a quasi-suspect class because the issue was not presented to any of the lower courts).

138. *See, e.g.*, Trautz v. Weisman, 819 F. Supp. 282, 293 (S.D.N.Y. 1993) (finding that prior case law that concluded that disabled persons do not constitute a suspect

Second, heightened scrutiny is particularly appropriate where, as here, a statute removes protection formerly enjoyed by the affected group. Until the ban was passed, military law prohibited adverse employment actions against servicemembers on the basis of their HIV-positive status.[139]

Rational Basis Review Fails. Even if the HIV provision is subject to rational basis review, recent Supreme Court case law reaffirms that this lowest level of scrutiny has real "teeth."[140] A

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class because they have not suffered a history of discrimination is undercut by the ADA); People v. Green, 561 N.Y.S.2d 130, 132–33 (Westchester County Ct. 1990) (employing rational basis review to invalidate the use of peremptory challenges against a deaf person and noting that disabled persons could constitute a suspect classification entitled to strict scrutiny under New York disability law and evaluating that law's protection against the background of the ADA); *see also* Montanaro, *supra* note 135, at 621.

139. *See* 10 U.S.C. § 1074 note (1988) (Restriction on Use of Information Obtained During Certain Epidemiologic-Assessment Interviews) ("Information obtained by the Department of Defense during or as a result of an epidemiologic-assessment interview with a serum-positive member of the Armed Forces may not be used to support any adverse personnel action against the member.").

The HIV ban also could present a violation of federal disability law. *See, e.g.*, Rehabilitation Act of 1973, 29 U.S.C. § 791 (Supp. 1996) (federal government equivalent to the Americans with Disabilities Act, 42 U.S.C. § 12,102(2) (1995), which generally protects persons with HIV from loss of employment); Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-16 (1994); *cf.* Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1321 (E.D. Pa. 1994). Although most courts have held that the military is exempt from federal anti-discrimination law, *see, e.g.*, Doe v. Marsh, No. 89-1383-OG, 1990 U.S. Dist. LEXIS 1442, at *14 (D.D.C. Feb. 8, 1990) (applying military exemption to reject claims brought by HIV-positive servicemember under the Rehabilitation Act and Title VII); *see also* Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990); Roper v. Department of the Army, 832 F.2d 247 (2d Cir. 1987); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987); Gonzalez v. Department of the Army, 718 F.2d 926 (9th Cir. 1983), some have noted that this exemption has no basis in law, *see, e.g.*, Hill v. Berkman, 635 F. Supp. 1228, 1238 (E.D.N.Y. 1986) (concluding that "members of the armed forces are federal employees who share in all Americans' constitutional right to equal protection under the law. There is nothing in Title VII to suggest that the uniformed military are an exception to 'members of military departments' expressly covered under § 2000e-16.").

Without a military exemption, HIV-positive servicemembers would be protected from discrimination on the basis of disability under the Rehabilitation Act. *See* Doe v. Centinela, No. 97 Civ. 22514 (C.D. Cal. June 10, 1988) (holding that discrimination based solely on fear of contagion of HIV is discrimination based on handicap for purposes of the Rehabilitation Act); Op. Off. Legal Counsel (Sept. 27, 1988) (holding that person who tests positive for HIV is "handicapped" within the meaning of section 504 of the Rehabilitation Act).

140. *See* Romer v. Evans, 116 S. Ct. 1620 (1996) (employing rational basis review to invalidate an amendment to the Colorado Constitution that would have barred all legislative, executive, or judicial action protecting gay men and lesbians from discrimination). Prior Supreme Court decisions have also invalidated legislation on rational basis review. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446–50 (1985).

As discussed *supra* note 99, *Romer* was decided after the Clinton Administration decided not to defend the HIV ban, and therefore the Administration did not use *Romer*

law that classifies a particular group must be "narrow enough in scope and grounded in a sufficient factual context for [a court] to ascertain that there existed some relation between the classification and the purpose it served."[141] The HIV provision did not meet this standard. There is almost no factual context from which a court could determine that the provision served the end of military readiness.[142] In fact, the legislative history of the HIV provision indicates an overwhelming belief that the ban did not promote military readiness, but rather, hindered it.[143] Both the Secretary of Defense and the Chairman of the Joint Chiefs of Staff noted that discharges were "unwarranted and unwise," "unnecessary as a matter of sound military policy," and "would waste the government's investment in the training of these individuals and be disruptive to military programs in which they play an integral role."[144] In addition, Congress did not explain how the unavailability of a small group of HIV-positive servicemembers for overseas deployment hindered military readiness[145] and offered no rationale for singling out servicemembers with HIV from the larger group of personnel on restricted deployment because of other chronic medical conditions.[146]

Moreover, there is no rational reason for the ban that a court could postulate on Congress' behalf.[147] A rationale justifying the separation of HIV-positive personnel because of fear of transmission of the virus[148] is impermissible because it reflects a

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as justification for its decision. A court evaluating the ban in a subsequent challenge, however, would likely have turned to *Romer* for guidance.

141. *Romer*, 116 S. Ct. at 1627.

142. *See* discussion *supra* Part I.

143. *See id.*

144. DOD/Joint Chiefs Statement, *supra* note 8.

145. *See* discussion *supra* Part I.A.

146. *See id.* Senator Sam Nunn concluded, "There is not a clearly articulated legislative basis for treating HIV-positive personnel in a manner that differs from the treatment of other nondeployables." 142 CONG. REC. S2294 (daily ed. Mar. 19, 1996) (statement of Sen. Nunn). The absence of careful legislative consideration that normally accompanies changes in military personnel policy strikes a fatal blow against the HIV provision's survival of a constitutional challenge. *See id.*

147. Under rational basis review, the government has no obligation to produce evidence to sustain a statute's validity; rather, any possible rational speculation will provide justification. *See* Heller v. Doe, 509 U.S. 312, 321 (1993). Nonetheless, "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Id.* at 321.

148. *See* 139 CONG. REC. H7081 (daily ed. Sept. 28, 1993) (statement of Rep. Dornan) ("[E]very military unit is a walking blood bank. . . . We simply cannot risk polluting the blood supply by allowing practicing homosexuals in the military.").

misunderstanding of the risks of transmission.[149] Congress' proferred justification for legislation cannot be an "accidental byproduct of a traditional way of thinking about [the affected group]."[150] Representative Dornan's assertion that servicemembers contracted HIV through practices that violate the Uniform Code of Military Justice ignores well-established medical knowledge that HIV is often transmitted through blood transfusions or heterosexual conduct, acts that do not constitute military misconduct. Fifty percent of servicemembers with HIV have spouses of the opposite sex infected with the virus,[151] suggesting that transmission could have occurred through spousal contact[152] and that the spouse may have contracted the virus first.

Punishment on Account of Status. Even if it can be established that most servicemembers contracted the virus through misconduct, singling out HIV-positive servicemembers for discharge impermissibly punishes them on account of their HIV-positive status.[153] Conduct such as intravenous drug use, gay sex, or sex with prostitutes, which the military may choose to punish, must be distinguished from the "status" of being HIV-positive, which the military may not punish.[154]

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149. *See, e.g.*, Steffan v. Aspin, 8 F.3d 57, 69 (D.C. Cir. 1993) (holding that a military policy preventing gays and lesbians from serving in the armed forces could not be justified rationally based on evidence of increased risk of HIV infection from same-sex sexual activity, and stating that it is impermissible to assume that gay persons would break rules by engaging in such activity, much less that they are HIV positive); *cf. Unfair Ban on HIV in Uniform*, S.F. EXAMINER, Feb. 12, 1996, at A16, *available in* LEXIS, News Library, Curnws File (asserting that the HIV ban is "a throwback to more fearful days when the difficulty of transmitting the virus was less widely understood").

150. *See* Rostker v. Goldberg, 453 U.S. 57, 74 (1981) (rejecting equal protection claim where Congress' decision to exclude women from draft "was not the 'accidental byproduct of a traditional way of thinking about females' " (citations omitted)). The rationale offered by Representative Dornan certainly constitutes an unfortunate byproduct of societal notions about HIV-positive individuals.

151. *See Clinton Won't Defend HIV Law; Repeal Proposed*, *supra* note 8, at 10 (noting Defense Department data that one-half of HIV-positive servicemembers are married).

152. *See, e.g.*, Priest, *supra* note 39, at A3 (interviewing HIV-positive Army Sergeant who contracted the virus from her husband).

153. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (overturning conviction of an individual for his drug addiction because it made "the 'status' of narcotic addiction a criminal offense," constituting cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments); *see also* Powell v. Texas, 392 U.S. 514, 532–34 (1968) (affirming the *Robinson* reasoning that status and activity can be distinguished even when the defining characteristic of the status is to engage in a particular activity).

154. *See Robinson*, 370 U.S. at 660; *Powell*, 392 U.S. at 514. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court held that sodomy is not a fundamental right and may be criminalized, but explicitly refused to consider any implicated equal protection issue.

Congress did not establish that there was a military need to discharge all HIV-positive servicemembers to maintain order.[155] The military already has administrative and judicial procedures in place to discipline those involved in misconduct. Furthermore, punishment on account of HIV-positive status would be overinclusive because not all persons who contracted the virus did so through misconduct.[156] The provision does not make exceptions for persons who contracted HIV through a "legitimate" transmission.[157] Such persons must be allowed to rebut the presumption that they engaged in misconduct.[158]

Finally, while Congress may be legitimately hostile to persons convicted of crimes, it did not limit the HIV provision to persons convicted, or even accused, of violations of the Uniform Code of Military Justice.[159] To penalize them as if they had engaged in "misconduct," without a hearing or other administrative or judicial procedures, may present due process concerns. HIV infection would operate as a per se determination that the virus was contracted through a violation of the Uniform Code of Military Justice.[160]

Discriminatory Motive. A classification violates the Equal Protection Clause where furthering an impermissible purpose was a motivating factor for establishing the classification. (It

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See id. at 196 n.8; Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 403 n.162 (1995). The rejection of an anti-gay rights law in *Romer* lends recent support to the idea that the "status" of homosexuality may not be penalized. *See* Romer v. Evans, 116 S. Ct. 1620, 1629 (1996).

155. For an assertion of these arguments, see Senator Nunn's statements in 142 CONG. REC. S2294 (daily ed. Mar. 19, 1996).

156. *See, e.g.*, Priest, *supra* note 39, at A3 (describing the difficulties faced by an HIV-positive servicemember who contracted the virus from her husband).

157. It may be that no reason is legitimate enough for the proponents of the ban. *See id.* (regarding an Army Sergeant who contracted HIV from her husband, Representative Dornan remarked that "she obviously had unprotected sex with someone whose entire background she didn't know. . . . She should be a good patriot and take her honorable discharge.").

158. In the context of the ban on gays and lesbians in the military, servicemembers have been allowed to rebut the presumption that they have the "propensity" to engage in same-sex sexual conduct forbidden under military law. *See* Richenberg v. Perry, 909 F. Supp. 1303, 1313 (D. Neb.), *aff'd*, 97 F.3d 256 (8th Cir. 1995); Able v. United States, 880 F. Supp. 968, 976 (E.D.N.Y. 1995), *vacated*, 88 F.3d 1280 (2d Cir. 1996).

159. In fact, under the provision, servicemembers would have received honorable discharges. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 567(a)(1)(b), 110 Stat. 186, 328 (amending 10 U.S.C. § 1177 (1994)).

160. *Cf. Richenberg*, 909 F. Supp. at 1313 (rejecting a due process claim where a servicemember facing a presumption of a propensity to engage in same-sex sexual conduct is afforded a full hearing and an opportunity to rebut that presumption).

need not be the only motivating factor.) Prejudice against a particular class of persons may not be either a direct or an indirect motivating factor for creating a law.[161] Representative Dornan's remarks provide sufficient evidence that the HIV provision was motivated by prejudice, at least in part, against persons with HIV.[162] Legislation motivated by a desire to harm a politically unpopular group does not further a legitimate governmental purpose.[163]

D. A President May Decline to Defend "Probably" Unconstitutional Legislation

Although the Clinton Administration maintained that its chances for overturning the HIV ban on constitutional grounds were good,[164] the discussion in Part II.C reveals that a court arguably could have held the statute constitutional. The HIV provision was not "patently" unconstitutional as that standard traditionally has been understood.[165] Moreover, it cannot be posited that no "reasonable" argument in support of the HIV ban's constitutionality existed.[166] President Clinton's decision reflects an emerging lower standard for presidential determinations that legislation is unconstitutional and therefore not worthy of defense: the executive branch may decline to defend a statute in situations where it determines that the statute is "probably" unconstitutional. There need not be an existing court decision on the constitutional issue or arguments supporting only one side of the dispute.[167] Under these circumstances, what legislation will be deemed "probably" unconstitutional becomes

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161. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

162. *See* discussion *supra* Part I.A.

163. *See* Romer v. Evans, 116 S. Ct. 1620, 1628 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973))); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446–47 (1985).

164. *See* Quinn/Dellinger Briefing, *supra* note 35, at 7; *Clinton Won't Defend HIV Law; Repeal Proposed*, *supra* note 8, at 1.

165. *See supra* note 69 and accompanying text

166. *See supra* notes 89–92 and accompanying text.

167. The HIV ban is not subject to the "foreclosed as litigable" standard articulated in *Simkins*. *See* Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *see also* discussion *supra* Part II.B.

a question of leadership: the executive branch must conduct its own constitutional evaluation and determine which position is most "respectable." Such evaluations appropriately may reflect a President's policy or political agenda.[168] President Clinton's position that the statute was unconstitutional not only took into account judicial precedent but also served a policy goal of supporting HIV-positive troops as valuable members of the military[169] and a political agenda of catering to widespread public opposition to the ban.[170]

III. IS A LOW THRESHOLD APPROPRIATE AS A MATTER OF POLICY?

Central to the determination of whether President Clinton's decision not to defend the HIV provision was correct as a matter of policy is the vision we have of our democratic institutions. If we believe that the legislature is the best governmental body to refine and enlarge the views of the population at large,[171] we might reject the President's decision not to defend legislation as an attempt to contravene the public will. Conversely, if we suspect that the legislature may not always be able to distill the will of its constituents correctly, or to uphold certain fundamental rights, especially those affecting minority

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168. Commentators have recognized similar standards for executive branch constitutional interpretation in the context of Attorney General opinion writing. *See* McGinnis, *Models of the Opinion Function*, *supra* note 68, at 375. One model of Attorney General legal interpretations—akin to the "no respectable argument" standard for decisions not to defend legislation—allows a President to interpret the law independently of Supreme Court precedent. *See id.* at 389–400 (describing an "Independent Authority" model of presidential legal interpretation). In another model, which incorporates the political or policy aspects considered in a decision to decline to defend legislation, the President "simply interprets the law to advance his political objectives, taking into account precedent or legal principles only to the extent that they may create a political obstacle to fulfilling those objectives." *Id.* at 381 & n.18 (describing an "Institutional" model and noting that this model is most common in actual practice). President Clinton's decision not to defend the HIV provision reflects both the "Independent Authority" and "Institutional" models of presidential legal interpretation, as well as a "Court-Centered" model, which exclusively looks to and relies upon judicial precedent for guidance on the constitutional issue. *See id.* at 382–89.

169. *See* discussion *supra* Part I.B.

170. *See* discussion *supra* Part I.C.

171. *See generally* THE FEDERALIST NO. 10 (James Madison) (noting that the effect of representative government is "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country").

groups, we might support more flexible structures and relationships of representation, with increased reliance upon the executive and the judiciary.[172]

In order to determine whether a lower standard with respect to presidential non-defense of legislation is proper as a matter of policy, we must consider the appropriate role of the President in furthering the purposes and goals of democracy. We must evaluate whether a presidential decision not to defend legislation leaves the executive branch unaccountable for its action, thereby thwarting the purpose of representative government, or merely protects the interests of minority groups who are effectively excluded from the political process.

Our view as to whether the HIV ban was unconstitutional also affects the analysis. If we believe individual constitutional rights were infringed, then the political process did not work, and our democratic institutions have failed, providing further support for President Clinton's decision to step in to cure the defect.

This Part looks at considerations that legitimize President Clinton's decision regardless of whether support for it is found within the plain language of the Constitution or in legal precedent. This Part argues that the grounds on which a President may support his decision not to defend do not enlarge his authority inordinately nor undermine the role and function of the legislative or judicial branches.

This Part addresses these broad political questions through a discussion of considerations raised by a presidential decision not to defend legislation. Through this analysis, this Part concludes that it makes sense to support a standard that allows the President to decline to defend "probably" unconstitutional legislation where Congress has failed to deliberate over the constitutional issue, the provision is attached to massive, badly needed funding legislation rendering a presidential veto impractical, and the President determines that it is not respectable to support Congress' position. This standard is consistent with constitutional separation of powers principles and ensures that non-defense is appropriate as an executive branch prerogative.

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172. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 609 (1969) (asserting that the separation of powers was intended primarily to protect individual rights from encroachments by the legislature); *see also* THE FEDERALIST NO. 48 (James Madison) ("The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.").

A. Concerns Regarding Non-Defense

As the quick repeal of the HIV provision suggests, the President's decision not to defend legislation may have substantial impact on federal law. Consequently, applying a lower threshold to the President's determination that enacted legislation is unconstitutional and therefore should not be defended raises a number of concerns.[173]

Most significantly, affording the President the discretion to withhold the defense of a statute could jeopardize the equilibrium established by the separation of powers required by the Constitution.[174] Specifically, the exercise of this discretion may shift substantially authority over the practical content of federal law from the legislative to the executive branch. First, presidential discretion to decline to defend legislation would render congressional lawmaking less certain.[175] The influence of the executive branch would be increased both in the drafting and the passage of legislation.[176] Second, as the President selectively declines to defend statutes, the resulting federal laws would reflect his policy preferences and diminish those of Congress.[177] Third, by declining to defend a legislative provision, the President would accomplish indirectly what the Constitution would not allow him to do directly: the invalidation of specific statutory provisions after their enactment or the exercise of a line-item

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173. On the whole, commentators have been critical of a President's ability to decline to execute statutes. *See, e.g.*, EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 72 (5th ed. 1984) (stating that the President must promote enforcement of a statute of questionable constitutionality by all powers constitutionally at his disposal unless and until enforcement is prevented by regular judicial process); Miller & Bowman, *supra* note 82, at 72 ("[T]he presidential obligation faithfully to execute the laws does not give the Chief Executive a selective item veto over the laws he is to execute."); Note, *supra* note 52, at 971.

174. *See* 4A Op. Off. Legal Counsel 55, 56 (1980); Note, *supra* note 52, at 976–79.

175. Press accounts of President Clinton's decision not to defend the HIV provision supported the existence of such uncertainty, reporting that President Clinton could not accept the HIV provision as final even as he signed it into law. *See, e.g.*, *Clinton Signs Defense Bill*, ASSOCIATED PRESS, Feb. 10, 1996, *available in* LEXIS News Library, Curnws File. *See generally* Note, *supra* note 52, at 979 (asserting that presidential nondefense of legislation renders congressional lawmaking less certain).

176. Congress would be forced to present the President with legislation that would pass his review on two levels: first, to avoid veto, and second, to be ensured defense. *See* Note, *supra* note 52, at 979 n.28.

177. *Cf.* Metzenbaum v. Brown, 448 F. Supp. 538, 542 (D.D.C. 1978) (stating that a pocket veto would "increase the power of the President over the enactment of bills of Congress into law [and] would diminish the power of Congress to make laws").

veto without a congressional opportunity to override it.[178] In effect, the President would exercise the power of repeal, which the Constitution reserves for Congress.[179] Finally, presidential non-defense would promote administrative lawmaking by allowing the President to attempt to achieve through executive authority what he has been unable to achieve through negotiations with Congress.[180] A decision not to defend could also intrude upon the constitutional power of the judiciary to determine the validity of congressional legislation.[181]

B. How Those Concerns Are Alleviated

A number of arguments alleviate the concerns raised by presidential authority to decline to defend legislation. These

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178. *See* EASTLAND, *supra* note 61, at 76 (stating that consistent with the Constitution, a President "should not reach into a bill presented to him and attempt to veto some part of it. The Presentment Clause . . . does not contain a so-called 'item veto.' "); Note, *supra* note 52, at 971 n.2.

The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), has raised constitutional concerns similar to those presented by presidential non-defense of legislation. This Act, which went into effect on January 1, 1997, allows a President to veto, or "cancel," specific dollar spending amounts contained in appropriations or certain other direct spending bills. *See id.* § 1021, 110 Stat. at 1200–01. Congress, however, retains the opportunity to override, or "disapprove," of the item vetoed by the President. *See id.* §§ 1021, 1026, 110 Stat. at 1200-01, 1207-10. Several members of Congress have already challenged the Line Item Veto Act as an unconstitutional interference with Congress' legislating authority. *See* Toni Locy, *Six Lawmakers Challenge Constitutionality of Line-Item Veto for President*, WASH. POST, Jan. 3, 1997, at A20.

179. *See* U.S. CONST. art. I, § 1; Note, *supra* note 52, at 971 n.2.

180. *See* Cornell W. Clayton, *Introduction: Politics and the Legal Bureaucracy*, *in* GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS, *supra* note 61, at 9 ("[P]residents, faced with increasingly hostile Congresses (usually controlled by the opposing party), began to rely heavily on administrative rather than legislative strategies of policy-making. . . ."). President Clinton's response to the HIV provision was designed clearly to achieve administratively what the executive branch was not able to achieve in its fight with Congress over the ban. This strategy was apparent to the news media, *see, e.g.*, *ABC World News Saturday* (ABC television broadcast, Jan. 27, 1996), *available in* LEXIS, News Library, Curnws File ("[T]he administration hopes . . . to figure out ways to get round the discharge provision before it becomes effective."), and was reflected in both the decision not to defend and in the commitment to ensure full benefits to affected servicemembers.

181. *See* U.S. CONST. art. III, § 2; *see also* 39 Op. Att'y Gen. 11, 15 (1937) ("Should the Attorney General now vouchsafe his opinion holding the legislation unconstitutional, he would set himself up as a judge of the acts of Congress and of the President"); 4A Op. Off. Legal Counsel 55, 60 (1980). *But cf.* Gavett v. Alexander, 477 F. Supp. 1033, 1044 (D.D.C. 1979) (noting that a constitutional determination by the executive branch, although not binding upon courts, is entitled to significant weight).

arguments suggest that a lower threshold for presidential non-defense actually promotes traditional principles of democracy.

1. Adequate Representation Ensured for Congress—Perhaps most importantly, executive branch non-defense of legislation does not leave congressional interests unprotected if the legislation is challenged in court. When the executive branch makes a decision not to defend a statute, Congress has an independent means of defending the legislation's validity. In 1978, Congress created an institutionalized alternative to Department of Justice legal representation.[182] The Senate Legal Counsel's Office and the Counsel to the Clerk of the House of Representatives now regularly intervene in judicial proceedings to represent Congress or its interests when the Department of Justice refuses.[183] Congress also may hire private legal counsel.[184] As a result, Congress' interests are protected without having to resort to direct challenges to the President's authority to decline to defend statutes.[185] In fact, a court likely would refuse to recognize that Congress' authority had been injured if Congress declined to undertake the legislation's defense itself.[186]

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182. *See* Ethics and Government Act of 1978, 2 U.S.C. § 288 (1994) (establishing the Office of Senate Legal Counsel). This statute authorizes the Senate Legal Counsel to intervene or appear, when authorized by the Senate, in any legal action "in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." *Id.* § 288e(a).

The introduction of independent congressional litigating authority coincides with increased instances of executive branch non-defense. Prior to the creation of the Senate Legal Counsel, Justice Department refusals to defend Congress and its statutes were rare. *See* discussion *supra* Part II.B. It may be that the presence of this legislation has given the executive branch more flexibility to decide to decline to defend legislation it finds offensive. It may also be that in the post-Watergate era, the two branches have redefined their relationship to some extent, with Congress seeking more protection from a Justice Department that does not appear professionally independent from the President.

183. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990); INS v. Chadha, 462 U.S. 919 (1983); League of Women Voters v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980).

184. *See* PETER M. SHANE & HAROLD H. BRUFF, THE LAW OF PRESIDENTIAL POWER 409 (1988).

185. Courts have adopted such a view where executive action that arguably exceeds its authority is reviewable through the existence of other possible plaintiffs. *See* Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 881–82 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

186. Courts have required that in order for Congress to be "injured" for purposes of standing, it must have exhausted all possible remedies. *See* Goldwater v. Carter, 444 U.S. 996, 997–98 (1979) (stating that a dispute between the legislative and political branches is not ripe for judicial review until these political branches reach a constitutional impasse); *see also* Note, *supra* note 52, at 981 n.39 (noting that a court would likely recognize that any party with standing to seek a writ of mandamus would have standing to defend the statute and that a court would not be likely to recognize that an

In contrast, where a President refuses to *enforce*, as opposed to *defend* legislation passed by Congress, he interferes more significantly with the interests of the legislative branch. Congress possesses no means through which it may implement legislation; that function falls exclusively within the sphere of executive branch authority.[187] For this reason, it makes sense to require a higher threshold of unconstitutionality when a President declines to enforce legislation. He only should be permitted to decline to enforce Congress' mandate in situations where the legislation is "patently" unconstitutional.[188]

2. Adequate Notice and Accountability—Although no statutory provision requires it, modern Presidents announce their opinions on the constitutionality of legislation in their signing statements.[189] In such a statement, President Clinton announced his decision not to defend the HIV provision because he believed it was unconstitutional, thereby ensuring his immediate public accountability.[190] This announcement prompted Congress to

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injury exists for purpose of the writ if the party seeking it refused to defend the statute itself).

187. *See* U.S. CONST. art. II, § 3 (stating that the President shall take care that laws are faithfully executed). In fact, courts may tend to come down hard on Congress when it moves outside the legislative sphere into the executive one. *See, e.g.*, *Chadha*, 462 U.S. at 954–55 (refusing to allow Congress to interfere with authority delegated to the executive branch). As we have seen, courts do not tend to react as strongly to presidential non-defense, which arguably moves outside of the executive sphere and interferes with the legislative one. *See* discussion *supra* Part II.B.

188. *See* discussion *supra* Part II.B.

189. *See* The Legal Significance of Presidential Signing Statements, Op. Off. Legal Counsel 4 (Nov. 3, 1993); EASTLAND, *supra* note 61, at 73–75; *cf. generally* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987) (arguing that courts should ignore presidential signing statements when attempting to discern congressional intent).

The executive branch usually does not inform Congress when it is considering declining to defend a statute. *See Congressional Interest Hearings*, *supra* note 69, at 86 (supplemental statement of Rex Lee, Assistant Attorney General) ("It is not the practice of the Department of Justice to consult with Congress in determining whether to defend a statute, nor does it consult with Congress in determining whether to appeal an adverse constitutional holding.").

190. *See* Signing Statement, *supra* note 4, at 261 ("In accordance with my constitutional determination, the Attorney General will decline to defend this provision. Instead, the Attorney General will inform the House and Senate of this determination so that they may, if they wish, present to the courts their argument that the provision should be sustained.").

Beginning with the Reagan Administration, Presidents increasingly have used signing statements as a tool for advancing a legal strategy. *See* Nelson Lund, *Guardians of the Presidency: The Office of the Counsel to the President and the Office of Legal Counsel*, *in* GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS, *supra* note 61, at 221; Frank B. Cross, *The Constitutional Legitimacy and*

request from the Justice Department an explanation of the executive branch authority for the decision to decline to defend the provision.[191] The explanation was provided promptly.[192]

In the absence of such early initiative by the President, federal law requires the Solicitor General to notify Congress in the event that the executive branch chooses not to defend the constitutionality of a statute at the appellate level.[193] Congress has authorized the President to decline to defend legislation at the appellate stage as long as he provides notification to Congress. In this instance, because the President is acting in accord

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Significance of Presidential "Signing Statements," 40 ADMIN. L. REV. 209, 210–11 (1988) (indicating that the practice dates back to President Andrew Jackson, but was formalized and popularized by President Ronald Reagan).

A signing statement may help effect a legal strategy in several ways. The statement may be used to instruct executive branch agencies on how to interpret or administer the law or to direct them to resolve statutory ambiguities in a way favored by the President. *See, e.g.*, Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 21, 1991). *See generally* Op. Off. Legal Counsel at 1–2 (Nov. 3, 1993).

The statement may interpret the statute and hope that courts will rely on the interpretation as a legitimate form of legislative history. *See id.* at 6. This use has been criticized as an inappropriate means of resolving politically sensitive issues or disputes with Congress, or as an improper effort to interpret away unconstitutional provisions, and as an undermining of statutory structure as well as constitutional separation of powers. *See, e.g.*, Garber & Wimmer, *supra* note 189, at 363; William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 709–17 (1991). In addition, courts may give little weight to such interpretations by a President. *See* Cross, *supra*, at 234–35; Popkin, *supra*, at 702–03 and nn.14 & 17.

A signing statement may also inform Congress and the public of the President's opinion that a particular provision is unconstitutional or that he will not enforce or defend it. *See* Op. Off. Legal Counsel 4 (Nov. 3, 1993). This use creates a record that can be used later to refute claims that the President has approved of constitutionally dubious provisions of bills that he has decided to sign because of his desire to see other provisions of the legislation become law. *See, e.g.*, Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357–58 (1953) (citing President Roosevelt's memorandum to his Attorney General in which he went on record about a Land-Lease Act provision's unconstitutionality so that his signing would "not be construed as a tacit acquiescence" in the provision and to prevent "his action in approving the bill which include[d] this invalid clause" from being "used as a precedent for any future legislation comprising provisions of a similar nature").

President Clinton's statement at the signing of the Act reflects each of these strategies. *See* Signing Statement, *supra* note 4, at 261.

191. *See* Letter from Senator Orrin G. Hatch, Chairman, Senate Committee on the Judiciary, to Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice (Feb. 21, 1996) (on file with the *University of Michigan Journal of Law Reform*).

192. *See* Letter from Assistant Attorney General Andrew Fois to Senator Orrin G. Hatch, *supra* note 30.

193. *See* Ethics in Government Act of 1978, 2 U.S.C. § 288K(b) (1994); *see also* Gavett v. Alexander, 477 F. Supp. 1035, 1043–44 (D.D.C. 1979) (discussing executive branch notification to Congress, as required by statute, when it refuses to defend legislation).

with congressional legislation, presidential authority is at its maximum and is afforded wide judicial deference.[194] The wide berth given to presidential authority in these circumstances can be extended reasonably to decisions not to defend statutes at the trial stage where, as with the HIV provision non-defense decision, notification is provided to Congress.[195]

3. Check on the Legislature—Because the Constitution places limits on what the legislative branch lawfully may do, it makes sense to allow the President discretionary authority regarding execution of the acts of Congress.[196] Such authority serves as a check on the legislature where it passes legislation in violation of the Constitution. If the President were compelled to defend statutes that he believes to be unconstitutional, the end effect could be the legislature's usurpation of executive power.[197]

4. Judicial Resolution Available—A presidential decision to decline defending legislation forces resolution of the dispute in the judiciary, the branch best equipped to handle it.[198] While the President's constitutional determination may be given some weight by the courts,[199] ultimately the judiciary will decide the constitutional question and serve as a check on the President should he overstep his authority.

5. Lack of Clear Guidelines—The underlying rationale for executive branch deference to congressional legislation is that, in most cases, the judiciary can be relied upon to invalidate

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194. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1951) (Jackson, J., concurring) (stating that presidential authority is at its maximum when the President's acts are authorized by Congress).

195. Because the Justice Department possesses complete discretion to appeal decisions finding statutes unconstitutional, declining to defend legislation at the trial level could be characterized as an exercise of that same discretion. *See* Note, *supra* note 52, at 977 n.27. One could argue, however, that at the appellate level, the judiciary has been involved previously, meaningfully distinguishing this discretion to decline to defend legislation exercised at the trial stage.

196. *See* 4A Op. Off. Legal Counsel 55, 58 (1980); *see also* Op. Off. Legal Counsel 4 n.8 (Nov. 3, 1993) (noting that because the legislature possibly may transgress the bounds assigned to it, and the judiciary may pronounce the legislature's conduct void, the President, by analogy, should not execute unconstitutional laws (paraphrasing constitutional framer James Wilson)).

197. *See* 4A Op. Off. Legal Counsel 55, 57 (1980).

198. *See* League of Women Voters v. FCC, 489 F. Supp. 517, 521 (C.D. Cal. 1980) ("[T]his suit is flavored by a *sub silentio* prayer by the Executive branch for action by the Judicial branch that it cannot take itself."); *see also Gavett*, 477 F. Supp. at 1044 ("[I]t is the function of the courts ultimately to determine the constitutionality of federal actions and laws." (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803))).

199. *Cf. Gavett*, 477 F. Supp. at 1044 (noting that while determination by the executive branch that a statute is unconstitutional is not binding on the court "it constitutes a significant circumstance which should be accorded some weight").

unconstitutional laws.[200] A lack of Supreme Court resolution of many constitutional issues, however, including the equal protection issues raised by the HIV ban,[201] may explain the increased presidential assertions of the authority to decline to defend legislation.[202]

6. Independent Presidential Powers of Interpretation—The President's duty to execute laws, including those enumerated within the Constitution, necessarily implies an authority to interpret the Constitution independently.[203] The Constitution provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[204] These powers permit inquiry into the constitutionality of statutes even after legislation has been passed.[205]

Constitutional interpretations by the President are not limited to statutes that solely implicate executive powers.

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200. *See* 4A Op. Off. Legal Counsel 55, 59 (1980).

201. *See* discussion *supra* Part II.C.

202. *Cf.* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 826–28 (1982) (suggesting that the institutional structure of the Supreme Court, with its changing membership and shifting coalitions, makes it impossible for the Court to render consistent decisions); McGinnis, *Models of the Opinion Function*, *supra* note 68, at 383 (noting limitations of relying on Supreme Court constitutional jurisprudence).

The Court has noted its own limitations regarding its ability to enforce constitutional norms. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539–47 (1985) (declining enforcement of the Tenth Amendment in part because it was unable to draw principled lines between "traditional" protected and unprotected state functions).

203. *See* United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution . . . ."); *see also* Op. Off. Legal Counsel 2 (Nov. 2, 1994) ("[T]he President can and should exercise his independent judgment to determine whether the statute is constitutional"); EASTLAND, *supra* note 61, at 70 ("Rejecting advice based on those precedents that he had no choice but to sign the bill, [President] Jackson correctly observed in his veto message that he had taken an oath of office to support the Constitution 'as he understands it, and not as it is understood by others.' "); McGinnis, *Models of the Opinion Function*, *supra* note 68, at 411 (quoting President Lincoln's conviction that an executive owes greatest deference to his own convictions when exercising his interpretive authority); Miller, *supra* note 131, at 36; *cf.* Freytag v. Commissioner 501 U.S. 868, 906 (1991) (Scalia, J., concurring) ("[T]he means [available to the President] to resist legislative encroachment . . . [include] the power to veto encroaching laws or even to disregard them when they are unconstitutional." (citations omitted)).

204. U.S. CONST. art. II, § 2, cl. 1.

205. *See* 4A Op. Off. Legal Counsel 55, 60 (1980) (stating that nothing in the statutorily defined duties of the attorney general "either requires or forbids him to inquire into the constitutionality of statutes"). *But see* 39 Op. Att'y Gen. 11, 14 (1937) ("[T]here rarely can be proper occasion for the rendition of an opinion by the Attorney General upon [a statute's] constitutionality after it has become law.").

Presidents have established the authority to evaluate independently the merits of statutes affecting a range of constitutional rights.[206] President Clinton exercised this independent interpretive authority when evaluating equal protection arguments against the HIV provision.[207]

Furthermore, executive interpretation may reflect the national will more than judicial interpretation because the President is the nation's elected executive, and consequently his interpretation will reflect greater sensitivity to political concerns.[208] For example, the discussion in Part II.C suggests that a court could have upheld the HIV provision as constitutional.[209] Yet public opinion reflected strong opposition to the ban as discriminatory.[210] President Clinton's determination that the ban was unconstitutional, therefore, more accurately reflected the public will.

7. Veto Was Impractical—President Clinton vetoed the defense bill when it was first presented, citing the HIV provision as one of his reasons for objecting to the legislation.[211] This initial veto raised little legal controversy. A President may veto legislation on any ground.[212] In addition, objections based on more tenuous constitutional challenges may be asserted at the veto stage because the President's action will not be subject to legal challenge or subsequent court rejection.[213]

The veto is the most powerful instrument available to the President to register objections to legislation.[214] Moreover, the

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206. *See supra* Part II.B. (discussing cases in which courts have not questioned presidential independent constitutional interpretive authority).

207. *See* Signing Statement, *supra* note 4 at 261 ("I have concluded that this discriminatory provision is unconstitutional.").

208. *See* McGinnis, *Models of the Opinion Function*, *supra* note 68, at 403–06 (arguing that the unique political interests of the executive branch in constitutional interpretation serve as an appropriate check on the judiciary). The President's constitutional interpretations may also reflect the national will more accurately than those offered by Congress. *See* Myers v. United States, 272 U.S. 52, 123 (1926) ("[I]t may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . . .").

209. *See* discussion *supra* Part II.C.1.

210. *See* discussion *supra* Part I.C.

211. *See* Message to the House, *supra* note 22, at 2234. *See generally* Lou Chibbaro, Jr., *President Declares HIV Ban Unconstitutional*, WASH. BLADE, Feb. 16, 1996, at 19.

212. A President need not limit himself to objections based on an interference with his own constitutional authority. *See* EASTLAND, *supra* note 61, at 69–70 (noting that the veto "not only serves as a shield to the executive, but it furnishes an additional security against the enaction of improper laws" (quoting THE FEDERALIST NO. 73, at 217 (Alexander Hamilton) (Ray P. Fairfield ed., 1981))).

213. *See* McGinnis, *Models of the Opinion Function*, *supra* note 68, at 388, 431.

214. *See* Garber & Wimmer, *supra* note 189, at 372 (asserting that the veto is the sole method available to the President to object to legislation).

oath of office arguably imposes a constitutional requirement on the President to veto legislation that he believes is unconstitutional.[215]

The veto may not be a practical option, however, with respect to legislation containing critically needed provisions or exhibiting only partial constitutional deficiencies.[216] The $256 billion defense authorization bill presented President Clinton with such a predicament.[217] The ultimate decision to sign the bill, but not to defend the ban, followed the ten-day presentment period during which the Administration struggled to find a way to attain enactment of the vital military provisions, yet oppose the "completely abhorrent and offensive" HIV provision.[218] In the end, the need for defense funding made a second veto impractical.[219]

8. Ensures Debate over Constitutional Principles—Where the President has the authority to interpret the Constitution independently, he promotes debate between the branches of government over constitutional norms.[220] Not only might such

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215. *See* U.S. CONST. art. II, § 1, cl. 8 (requiring the President to uphold the Constitution).

In addition, by not vetoing legislation, one could argue that a President tacitly is approving of the statute's constitutionality such that no further objection may be raised. *But cf.* Op. Off. Legal Counsel 6 (Nov. 3, 1993) (discussing and asserting the view that the President is not under an absolute duty to veto legislation containing an unconstitutional provision).

216. *See* Douglas W. Kmiec, *Judges Should Pay Attention to Statements by President*, NAT'L L.J., Nov. 10, 1986, at 13 (arguing that the veto "comports less well with legislation for which there is great necessity or that contains serious, but less extensive, constitutional problems"); Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 347–48 (1993) ("[T]he veto may be practically unavailable in the face of Congress' practice of lumping together numerous unrelated provisions in omnibus bills, often inserting the most controversial provisions in emergency appropriations measures passed at, or after, fiscal deadlines.").

217. *See* discussion *supra* Part I.A.

218. *See* Mitchell, *supra* note 24, at A1 (quoting White House Counsel Jack Quinn).

219. A presidential line-item veto for substantive policy items, with a congressional override provision, might eliminate the power imbalance that results when Congress attaches riders with which the President disagrees to legislation that the President believes is imperative. Presidential authority to decline to defend the rider provides greater protection for congressional legislating authority, however, because the law may be enforced and implemented by a majority vote of Congress, rather than by the two-thirds vote required to override a veto.

220. *See* LOUIS FISHER, CONSTITUTIONAL DIALOGUES 231–32 (1988):

> Under the doctrine of 'coordinate construction,' the President and members of Congress have both the authority and the competence to engage in constitutional interpretation, not only before the courts decide but afterwards as well. All three branches perform a valuable, broad, and ongoing function in helping to shape the meaning of the Constitution.

Id.

debate be productive, it actually might prevent usurpations of authority by a particular branch.[221] When President Clinton declined to defend the HIV provision, he ensured debate over the equal protection issue that had been ignored previously by Congress.[222] This debate ultimately led to the repeal. The non-defense decision also established an opportunity for a legal challenge to be brought, in which all three branches of government would be involved in the debate.[223] Furthermore, by announcing his decision to the public, the President ensured public participation in the debate. If the President's decision had been unpopular, he would have expended political capital; fear of unnecessary expenditure might serve as the ultimate check on a President's actions.

9. Inappropriate Link to Funding—The Constitution gives Congress the authority to assert funding power over the other branches,[224] and such authority may serve as an effective check where those branches arguably overstep their authority. Congress' ultimate control of the government purse strings prevents the President from abusing his authority to decline to defend legislation. For example, Congress may use this control to limit the Attorney General from attacking congressional statutes, including restricting her funds or even revoking her litigating authority.[225]

President Clinton's decision—to sign a provision he considered unconstitutional because it was attached to a needed defense appropriations bill—demonstrates how effective Congress'

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221. *See* McGinnis, *Models of the Opinion Function*, *supra* note 68, at 393.

222. Such renewed debate is particularly important where, as here, Congress failed to deliberate over the provision. *See* discussion *supra* Part I.A.

223. Assistant Attorney General Walter Dellinger acknowledged the opportunity created by President Clinton's decision for full debate on the HIV provision. *See* Quinn/Dellinger Briefing, *supra* note 35, at 3 ("[T]he action the President is taking, if the leadership of the House and Senate choose to defend this provision, will ensure that the courts are presented with a full range of argument in making their determination.").

224. *See* U.S. CONST. art. I, § 8.

225. *See, e.g.*, Pub. L. No. 96-132, § 21, 93 Stat. 1040 (1979) (appropriations bill requiring notification from Attorney General to Congress whenever Justice Department considered a congressional statute unconstitutional and requiring a declaration that her decision constitutes the view of the executive branch); Pub. L. No. 95-624, § 13, 92 Stat. 3459 (1978) (appropriations bill requiring notification from the Attorney General to Congress whenever the Justice Department would not support constitutionality of a federal statute in court).

Such actions may raise additional constitutional issues, however, namely to what extent Congress may regulate the executive branch. *See* Miller & Bowman, *supra* note 82, at 78.

funding power can be.[226] Such efforts by Congress to attach ill-considered provisions to large funding bills may increase the frequency of non-defense of statutes by the executive branch.[227] In the past, where Congress has attached to badly needed legislation provisions that the President finds objectionable, executive decisions not to defend the legislation have resulted. For example, *Lovett*[228] involved a conflict between a conservative Congress and a liberal President, with Congress asserting its control of the purse strings by attaching an offensive statutory provision to necessary funding.[229] President Roosevelt signed the act, but did not defend the provision.[230] Passage of the HIV provision represents a similarly improper leveraging of congressional funding authority, resulting in a presidential decision not to defend the legislation.[231]

10. Power Rarely Exercised—Presidential authority to decline to defend legislation that the President deems "probably" unconstitutional raises concerns that because there are no objective standards by which to evaluate presidential action the executive will overuse this authority. In practice, however, the executive branch rarely has exercised its power not to defend unconstitutional statutes.[232]

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226. The provision was repealed in a similarly necessary funding bill. *See* Pianin & Harris, *supra* note 42, at A1.

227. *Cf. A Law Not Worth Defending*, ROCKY MTN. NEWS, Feb. 14, 1996, at 47A, *available in* LEXIS, News Library, Curnws File (noting that from time to time "Congress forces dubiously constitutional laws down a president's throat" in important funding bills and that when, under these circumstances, Presidents may decline to enforce or defend those laws).

228. United States v. Lovett, 328 U.S. 303 (1946).

229. *See* Ely, *supra* note 61, at 1; Arthur Krock, *Congress is Re-invoking the Power of the Purse*, N.Y. TIMES, May 28, 1943, at 20.

230. *See Lovett*, 328 U.S. at 313 (describing President Roosevelt's opinion that the statute was unconstitutional); *see also* discussion *supra* Part II.B.

231. President Clinton relied upon *Lovett* in his decision not to defend the HIV provision, noting President Roosevelt's decision to sign the important funding bill while opposing a provision that he believed infringed on individual constitutional rights. *See* Signing Statement, *supra* note 4, at 261.

232. *See* Gavett v. Alexander, 477 F. Supp. 1035, 1044 (D.D.C. 1979) ("While occasionally the Executive Branch has declined to defend laws it considered to be unconstitutional . . . such occasions are exceedingly rare."); Note, *supra* note 52, at 1000.

For example, in both *Rostker* and *Thomasson*, the executive branch initially opposed Congress' restrictions on military eligibility for women and gay men respectively. In both cases, however, after debate and deliberation in the drafting stage, the Justice Department ultimately defended the legislation in court as constitutional. *See* Rostker v. Goldberg, 453 U.S. 57, 58, 60–61 (1981); Thomasson v. Perry, 80 F.3d 915, 919, 921–23 (4th Cir. 1996).

C. Non-Defense is Consistent with Democratic Theory

Part III.B demonstrated that presidential authority to decline to defend legislation promotes principles of democratic theory. First, such authority does not circumvent separation of powers principles by leaving congressional or judicial interests unprotected. Second, public accountability of the executive branch is ensured. Consequently, it makes sense to allow a President discretion to balance his duty to execute the laws with his duty to uphold the Constitution as the supreme law of the land where the President determines that a law is "probably" unconstitutional and Congress has failed to deliberate over the constitutional issue.

As the discussion above reveals, presidential assertions of this authority may be based more on practical necessity or on political considerations than on a sincere constitutional objection. While the same democratic principles continue to be promoted in these instances, additional arguments in favor of non-defense authority are also apparent. First, controversial or unpopular provisions inserted in critically needed omnibus funding bills may place a thumb too heavily on the scale in favor of Congress. This is particularly true where, as with the HIV provision, the constitutional issues are ill-considered and the provision fails to incorporate the views of the public at large. Presidential authority to decline to defend statutes serves to rebalance the authority between the branches. Second, allowing a President to incorporate policy or political considerations into his constitutional evaluation ensures that the branch most readily able to respond to public sentiment is able to do so, particularly where Congress fails adequately to consider an issue. The discretion to decline to defend legislation of dubious constitutionality ensures that the President plays a leadership role in guiding constitutional policy. At the same time, with congressional defense ensured, minority views remain protected. The courts are then able to resolve the issue after considering the strongest arguments on both sides. In contrast, the courts might not benefit from such strong opposing arguments if the executive branch were forced to defend legislation that it vehemently opposed.

Ultimately, this type of struggle between the government branches is not new. Presidents have established the authority to decline to defend statutes, whether based on sincere

constitutional objections or practical or political reality. The practice reflects the flexible nature of our democratic institutions. The other branches of the federal government are able to adapt, and indeed have adapted, to the reality of presidential assertions of this authority.

CONCLUSION

President Clinton's decision to decline to defend the HIV provision presents further evidence of executive branch efforts to establish a lower threshold of unconstitutionality for presidential non-defense of legislation. In contrast to presidential decisions declining to enforce legislation, the emerging standard for non-defense of statutes does not require existing precedent on the constitutional issue concerned, nor does it require the absence of valid arguments in support of the legislation. Rather, the executive branch has established the authority to decline to defend legislation where it evaluates the constitutionality of the statute against judicial precedent and determines that the statute is probably unconstitutional.

A lower threshold for non-defense of statutes is appropriate as a matter of law and policy. Presidents have asserted the authority to decline to defend legislation, establishing a practice to which courts have acquiesced. The authority satisfies separation of powers concerns and promotes democratic principles. Where Congress has failed to deliberate adequately over legislation, and the executive branch believes that the statute is probably unconstitutional, a lower threshold evens the scales between the two branches and facilitates the opportunity for deliberation among all three branches of the federal government.