



Alabama Law Scholarly Commons

Working Papers

Faculty Scholarship

8-23-2013

Congress's (Limited) Power to Represent Itself in Court

Felicia A. Burton

College of William and Mary - School of Law, SSRNeditor@wm.edu

Tara Leigh Grove

University of Alabama - School of Law, tgrove@law.ua.edu

Neal Devins

College of William and Mary - School of Law, nedevi@wm.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_working_papers

Recommended Citation

Felicia A. Burton, Tara L. Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, (2013).

Available at: https://scholarship.law.ua.edu/fac_working_papers/112

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

WILLIAM & MARY Law School

CONGRESS'S (LIMITED) POWER TO REPRESENT ITSELF IN COURT

Tara Leigh Grove

Neal Devins

William & Mary Law School

William & Mary Law School Research Paper No. 09-253

99 Cornell L. Rev. 571 (2014)

This paper can be downloaded without charge from
the Social Science Research Network Electronic Paper Collection:

<http://ssrn.com/abstract=2313950>

CONGRESS'S (LIMITED) POWER TO REPRESENT ITSELF IN COURT

Tara Leigh Grove† & Neal Devins††

Scholars and jurists have long assumed that, when the executive branch declines to defend a federal statute, Congress may intervene in federal court to defend the law. When invalidating the Defense of Marriage Act, for example, no Supreme Court Justice challenged the authority of the House of Representatives to defend federal laws in at least some circumstances. At the same time, in recent litigation over the Fast and Furious gun-running case, the Department of Justice asserted that the House could not go to court to enforce a subpoena against the executive. In this Article, we seek to challenge both claims. We argue that Congress has the constitutional power to enforce subpoenas but not defend federal statutes in court. Congressional defense of federal statutes violates two constitutional norms. First, except in certain specified situations (none of which are applicable here), the Constitution prohibits Congress or one of its components from having any role in the implementation of federal law. Second, unilateral defense by the House or the Senate violates the constitutional norm of bicameralism. The Constitution does not authorize either chamber to speak on behalf of Congress, much less the United States, in defense of federal law. By contrast, the Constitution gives each chamber considerable power to investigate wrongdoing by the executive and to conduct litigation growing out of such investigations—by, for example, enforcing subpoenas. We believe that this limited congressional power to appear in court makes eminent sense. The House and Senate counsel, as currently constituted, are poorly suited to defend their joint work product in court but are well situated to represent their respective institutions in other proceedings against the executive. Furthermore, this investigative power gives each chamber a powerful (and often overlooked) constitutional tool to do battle with the executive.

† Associate Professor, William and Mary Law School.

†† Goodrich Professor of Law & Professor of Government, College of William and Mary. We are grateful—for helpful comments on earlier drafts—to Jack Beermann, Steve Calabresi, Erin Delaney, Richard Fallon, Eugene Kontorovich, Andrew Koppelman, John McGinnis, Dan Meltzer, Henry Monaghan, Trevor Morrison, Jim Pfander, Marty Redish, and David Shapiro. Thanks are owed to Mike Davidson, Morgan Frankel, Thomas Griffith, and Charles Tiefer, current and former House and Senate counsel who shared their insights with us. Thanks, finally, to our able research assistants Jennifer Casazza, Joe Figueroa, Bryan Gividen, Brian Holland, Mary Kate Hopkins, Sam Mann, Justin Morgan, Nandor Kiss, and Jim Zadick. This paper was presented at Northwestern University School of Law; the Junior Faculty Federal Courts Workshop, William and Mary Law School; the Third Annual Constitutional Law Colloquium, Loyola University Chicago School of Law; University of Maryland Francis King Carey School of Law; the Structure of Standing Symposium in Honor of Judge William Fletcher, University of Alabama School of Law; and the Constitutional Law Colloquium at the University of Illinois College of Law.

INTRODUCTION	572
I. SEPARATING LEGISLATION AND IMPLEMENTATION	577
A. Constitutional Text and Structure	580
B. The Early Adherence to This Structural Division....	583
C. Congress Declined to Defend Federal Statutes Even in the Face of Executive Non-Defense	586
D. Congress and the Defense of Federal Statutes.....	593
E. Congressional Control over Internal House and Senate Proceedings	597
II. THE BICAMERALISM NORM: SEPARATING THE HOUSE AND THE SENATE	603
A. The Structural and Institutional Division Between the House and the Senate	604
B. The Development of the House and Senate Counsel	608
1. <i>The House Counsel as the Majority Party Counsel</i> ...	608
2. <i>From “Congressional Counsel” to Separate Senate Counsel</i>	611
C. House-Senate Differences and the Workings of the House and Senate Legal Counsel	614
III. CONSTITUTIONAL LIMITS ON CONGRESS IN COURT	622
CONCLUSION	630

INTRODUCTION

When ruling on the constitutionality of the Defense of Marriage Act (DOMA) in *United States v. Windsor*, the Supreme Court obliquely noted that the Obama administration’s refusal to defend the statute was “a complication.”¹ But thankfully, the House of Representatives came to the rescue through its “sharp adversarial presentation of the issues.”² Although the Court did not formally decide whether the House had standing to intervene and appeal in *Windsor* (since it held that the executive had standing), every Justice seemed to assume that Congress may sometimes stand in for the executive and defend federal laws.³ In fact, all nine Justices either acknowledged or approvingly referenced the intervention of the House and the Senate in the Supreme Court’s 1983 legislative-veto decision, *INS v. Chadha*,⁴ another case where the Department of Justice (DOJ) refused to defend the constitutionality of a federal statute.⁵

¹ 133 S. Ct. 2675, 2685 (2013).

² *Id.* at 2688.

³ See *infra* notes 327–33 and accompanying text.

⁴ 462 U.S. 919 (1983).

⁵ See *infra* notes 327–33 and accompanying text. In *Chadha*, the DOJ refused to defend the constitutionality of a statute authorizing a one-house legislative veto; in response, the Ninth Circuit Court of Appeals sought out House and Senate participation in the litiga-

The question of Congress's power to represent itself in court has also been raised in district court litigation between the House of Representatives and the DOJ. In June 2012, the House decided both to pursue a legal action against Attorney General Eric Holder and to find the Attorney General in contempt of Congress for failing to turn over documents relating to the controversial gun-trafficking program known as Operation Fast and Furious.⁶ In response, the DOJ challenged the House's power to judicially enforce the subpoena⁷—an argument that, if accepted, would dramatically undermine the House's capacity to investigate executive wrongdoing.⁸

We argue that Congress has the constitutional power to investigate the executive and judicially enforce subpoenas but that it cannot defend federal statutes in court. We thereby challenge a widespread assumption among jurists and scholars that, when the executive branch declines to defend a federal law, Congress may take over the litigation.⁹ Moreover, by highlighting Congress's investigative power,

tion. See *Chadha*, 462 U.S. at 928. For additional discussion, see *infra* notes 367–73 and accompanying text.

⁶ See Elizabeth Flock, *Eric Holder Gets Subpoena on Failed Fast and Furious Operation*, WASH. POST (Oct. 12, 2011, 8:40 AM), http://www.washingtonpost.com/blogs/blogpost/post/eric-holder-to-get-subpoena-on-failed-fast-and-furious-anti-gunrunning-operation/2011/10/12/gIQA9N7xeL_blog.html; Zoe Tillman, *Mediation Unlikely in Court Fight over Fast and Furious Documents*, BLOG LEGAL TIMES (Jan. 10, 2013), <http://legaltimes.typepad.com/blt/2013/01/mediation-unlikely-in-court-fight-over-fast-and-furious-documents.html>.

⁷ See Memorandum in Support of Defendant's Motion to Dismiss at 22–24, *Comm. on Oversight & Gov't Reform v. Holder*, No. 1:12-cv-1332, 2012 WL 5231437 (D.D.C. Oct. 15, 2012); see also Josh Gerstein, *Judge Skeptical of Obama in Executive Privilege Fight*, POLITICO (Apr. 24, 2013, 4:16 PM), <http://www.politico.com/story/2013/04/judge-skeptical-of-obama-on-executive-privilege-90587.html> (summarizing the arguments in an April 24, 2013 hearing on the issue).

⁸ On September 30, 2013, District Judge Amy Berman Jackson turned back DOJ efforts to dismiss the suit. See *Comm. on Oversight & Gov't Reform v. Holder*, No. 12-1332, 2013 WL 5428834, at *19–20 (D.D.C. Sept. 30, 2013); Josh Gerstein, *Fresh DOJ Loss in 'Fast and Furious' Docs Fight*, POLITICO (Sept. 30, 2013, 9:16 PM), <http://www.politico.com/story/2013/09/fast-and-furious-doj-documents-97604.html>. According to the court, “[d]ismissing the case without hearing it would in effect place the court’s finger on the scale, designating the executive as the victor based solely on his untested assertion that the privilege applies.” *Comm. on Oversight & Gov't Reform*, 2013 WL 5428834, at *19.

⁹ See, e.g., *Chadha*, 462 U.S. at 940 (“We have long held that Congress is the proper party to defend the validity of a statute when an agency of government . . . agrees with plaintiffs that the statute is inapplicable or unconstitutional.”); Drew S. Days, *The Interests of the United States, the Solicitor General and Individual Rights*, 41 ST. LOUIS U. L.J. 1, 5 (1996) (“[W]hen the Solicitor General is persuaded that the law cannot reasonably be defended[,] . . . Congress is free to represent itself.”); Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 952–53 (2012) (agreeing that Congress may step in when “the executive refuses to defend the constitutionality of federal legislation”); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 874 & n.260 (2001) (same); see also Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 113–14 (2006) (discussing Congress’s strong incentive to represent itself in separation-of-powers cases). One insightful student note does, however, question Congress’s authority to defend statutes. See James W. Cobb, Note, *By “Complicated and Indirect” Means: Congressional Defense of Statutes and the Separation of Powers*, 73 GEO. WASH. L. REV. 205, 208

we demonstrate that the Constitution gives the House and the Senate an alternative (and often overlooked) mechanism to challenge executive wrongdoing in court.¹⁰

Congressional defense of federal statutes violates two constitutional norms. First, the Constitution precludes Congress from having a direct role in the implementation of federal law, providing instead that the executive branch “shall take Care that the Laws be faithfully executed.”¹¹ Congress may influence the execution of federal law only through the formal mechanisms spelled out in the Constitution: the Senate’s role in the appointments process, impeachment, and statutes enacted via bicameralism and presentment.¹² Congress may not delegate to itself the power to execute the laws.¹³

Second, defense of federal statutes by the House or the Senate violates an additional constitutional norm: bicameralism. The Constitution divides the legislature into two separate and distinct chambers, so that each chamber can serve as a “check” on the other,¹⁴ and thus largely prohibits unilateral action by either chamber. Under this bicameral scheme, the House and the Senate must jointly consent to any piece of legislation and to the impeachment and removal of any federal official.¹⁵ Even when the Senate acts independently of the House (as in the realm of appointments and treaties), it does not act alone but serves only as a check on the President.

The Constitution creates an important exception to these structural principles, providing each chamber with the power to both establish and enforce “the Rules of its Proceedings.”¹⁶ Article I grants each chamber the authority to punish members for violating internal rules, conduct investigations, and issue subpoenas in connection with those investigations.¹⁷ Each chamber may even hold nonmembers in

(2004) (arguing that such defense violates the anti-aggrandizement principle and the Appointments Clause).

¹⁰ Notably, scholars have not previously recognized the importance of bicameralism to these debates. The bicameralism aspect of our argument is thus particularly novel. First, we explain why the bicameralism norm limits congressional defense of federal statutes but not its enforcement of subpoenas. *See infra* Part II. Second, we argue that Congress can make use of this investigative power to shape whether and how the executive defends federal laws in court. *See infra* notes 377–80 and accompanying text.

¹¹ U.S. CONST. art. II, § 3.

¹² *See* U.S. CONST. art. I, § 7, cl. 2; *id.* art. I, § 3, cl. 6; *Chadha*, 462 U.S. at 955–56.

¹³ *See Chadha*, 462 U.S. at 956 (discussing how, within the four provisions of the Constitution that authorize either the House or the Senate to act alone, “none of [the exceptions] authorize the action challenged here,” and “congressional authority is not to be implied”).

¹⁴ *See* U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which *shall consist* of a Senate and House of Representatives.” (emphasis added)).

¹⁵ *See* U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6; *id.* art. I, § 7, cl. 2.

¹⁶ *Id.* art. I, § 5, cl. 2.

¹⁷ *See id.*; *see also infra* Part I.E (elaborating on this power).

contempt for failing to cooperate with an investigation.¹⁸ The House of Representatives relied on this authority when it held Attorney General Holder in contempt for failing to comply with a subpoena in the Fast and Furious case.¹⁹ The bicameralism norm does not bar such investigations; Article I expressly allows each chamber to act unilaterally in this context.²⁰ To make this Article I power effective, each chamber must have the authority to litigate any matters arising out of its investigations, including by enforcing subpoenas.

Historical practice supports our argument for a limited congressional power to represent itself in court. From 1789 until modern times, the House and the Senate asserted the power to conduct investigations and to litigate any disputes related to those investigations. By contrast, Congress historically delegated control over all other federal litigation to the executive. That was true even when the executive branch declined to defend a federal law. Although members of Congress occasionally participated as amici in such cases, neither Congress nor its components asserted the power to intervene on behalf of federal laws. This historical pattern remained unchanged until 1983, when the Supreme Court—with virtually no explanation—permitted intervention by the House and Senate counsel in *INS v. Chadha*.²¹ As we demonstrate below, the Court in *Chadha* simply did not grapple with the textual and historical evidence against defense of federal statutes by components of Congress.

Furthermore, the current House and Senate counsel are well suited to represent their separate institutions in subpoena and other investigative matters but are poorly designed to defend their joint work product in court. As political scientists have documented, the two chambers of Congress maintain distinct institutional cultures.²² The House is largely controlled by the majority party leadership, while the Senate (due to procedures like the filibuster) can generally take action only with bipartisan support. The House and Senate counsel reflect these distinct institutional norms. The House counsel is a more “partisan” institution, participating in litigation at the request of the majority party leadership. For example, the House Republican leadership made the decision to defend DOMA over the vocal objection of Democratic minority leaders.²³ The Senate counsel, by con-

¹⁸ See *infra* Part I.A, B, E.

¹⁹ See Flock, *supra* note 6.

²⁰ See U.S. CONST. art. I, § 5, cl. 2; see also *infra* notes 158–59 and accompanying text (discussing Congress’s investigative power).

²¹ See 462 U.S. 919, 959 (1983) (invalidating the one-house legislative veto).

²² See *infra* notes 209–22 and accompanying text.

²³ See Chris Geidner, *House Republicans Vote to Defend DOMA in Court on Party Line 3-2 Vote*, METRO WKLY. (Mar. 9, 2011, 6:14 PM), <http://metroweekly.com/poliglot/2011/03/house-republicans-vote-to-defe.html>; see also Kathleen Hennessey, *Democrats File Amicus Brief*

trast (in keeping with that chamber's institutional norms), participates in litigation only when broad and bipartisan support exists within the chamber. The House and Senate counsel are thus well equipped to represent their respective chambers in matters that are specifically confided to them by the Constitution. But neither the House nor the Senate counsel can purport to speak for the entire Congress, much less the United States, when defending federal law.

This argument has important implications for both constitutional scholarship and litigation. First, our structural and historical analysis suggests that contrary to the predominant scholarly view, Congress may not appear as a party to defend laws in place of the executive branch. Second, our emphasis on bicameralism provides an independent constitutional basis for rejecting the power of the House or the Senate counsel to intervene on behalf of federal laws. This argument is significant because, as discussed below, the scope of "executive" functions is contested, and some jurists and scholars may doubt that the conduct of federal litigation is a sufficiently core "executive" function to preclude action by Congress as a whole.²⁴ But we believe there is no basis for permitting the House or the Senate, acting unilaterally, to defend their joint work product in court.

On the other hand, bicameralism and separation of powers principles allow the House and the Senate to litigate matters that arise out of internal chamber affairs. These matters are within the discretion of each chamber. As such, the very arguments cutting against congressional defense of federal statutes cut in favor of House or Senate control of internal proceedings, including judicial enforcement of subpoenas.

Our argument accordingly provides the House and the Senate with important mechanisms to object to executive non-defense of federal statutes—even absent the power to defend federal statutes themselves. The House and the Senate have the constitutional authority to subpoena the Attorney General to testify about any such refusal and to hold him in contempt if he fails to appear—as the House recently did in connection with Operation Fast and Furious.²⁵ Furthermore, if both the House and the Senate disagree with an executive refusal to defend, they always retain the power to impeach and remove the Attorney General (or the President). These are the ways in which the Constitution permits Congress to battle a recalcitrant executive. But

Challenging Defense of Marriage Act, L.A. TIMES (Nov. 3, 2011), <http://articles.latimes.com/2011/nov/03/news/la-pn-house-democrats-doma-20111103> (observing that 133 House Democrats filed an amicus brief declaring that DOMA is invalid).

²⁴ See *infra* notes 349–53 and accompanying text (discussing the debate on this issue).

²⁵ In this way, our analysis of Congress's investigative powers is important to the duty-to-define debate.

the Constitution does not permit the legislature to implement federal law.

Our argument proceeds as follows. Parts I and II provide the constitutional objections to the defense of federal statutes by Congress or its individual components. Those Parts also explain why nothing in the Constitution prevents either the House or the Senate from seeking judicial enforcement of a subpoena. Part III explains that current Supreme Court precedent largely supports our contentions—notwithstanding the erroneous assumption of the *Windsor* Court that Congress may intervene and defend federal statutes in court. Finally, as we explain in a brief concluding section, we do not think that our argument against congressional defense of statutes will have negative practical consequences. The executive should understand that it cannot look to Congress to fill the void and defend federal statutes, Congress can still file amicus briefs to express its views, and courts can appoint amici to offer arguments in defense of federal laws.²⁶

I

SEPARATING LEGISLATION AND IMPLEMENTATION

The defense of federal statutes by the House or Senate counsel violates two principles of our structural Constitution. First, the Constitution carefully separates the enactment of federal law from its implementation, sharply constraining Congress's role in and control over the latter.²⁷ Second (as discussed further in Part II), defense of statutes by the House or Senate counsel violates the structural requirement of bicameralism. The Constitution establishes only one exception to these structural principles, allowing each chamber of Congress to both establish and enforce rules governing its internal proceedings.²⁸ For this reason, the House or the Senate may conduct investigations, subpoena witnesses, and enforce subpoenas in court without violating either the separation of powers or bicameralism principles.²⁹

²⁶ For discussions of judicial authority to appoint amici to pursue issues that neither party to a case is willing to pursue, see generally Neal Devins & Saikrishna B. Prakash, Essay, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 864 (2013); Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 911–12 (2011).

²⁷ See discussion *infra* Part I.A, especially notes 47–57 and accompanying text.

²⁸ See *infra* notes 64–65 and accompanying text.

²⁹ Our constitutional analysis draws upon the widely accepted practice of making inferences from constitutional structure. For a discussion of this approach, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 22–32 (1969). Notably, we assert that a prohibition on congressional defense of federal statutes can be inferred from specific provisions of the Constitution: the provisions specifying that Congress may influence a law's implementation through the Senate's role in appointments, impeachment, and statutory enactment. We argue that these mechanisms are the only ways in

From 1789 until modern times, Congress carefully adhered to these structural principles, at least with respect to government litigation. Congress delegated responsibility for government litigation to actors outside of its control. The House and the Senate became actively involved in litigation only when it pertained to internal chamber affairs. We argue that this constitutional text, structure, and history seriously undermine the case for a legislative counsel with the power to defend federal laws. But this history strongly supports the constitutional authority of the House and the Senate to litigate matters arising out of internal investigations, including subpoena enforcement.

At the outset, however, we should clarify a few points. First, our argument does not rest on an assumption that the Constitution creates a “unitary executive” with the power to supervise and control all government litigation over federal statutes.³⁰ Although we believe, like many courts and commentators, that litigation over the meaning and constitutionality of federal law is an important part of the President’s executive functions,³¹ we do not assert that this role is exclusive. Instead, we argue that, whether or not Congress may vest “executive” functions in persons outside of the executive branch, the Constitution makes clear that Congress cannot give itself the power to execute or control those executing federal law. In short, our emphasis here is *not* on the scope of power that the Constitution vests in the President. Instead, our focus is on the powers that the Constitution grants to and the constraints that it places on Congress.

Second, in our discussion of congressional defense of federal statutes, we focus on cases in which the executive has declined to defend

which Congress may influence the implementation of federal law. Our argument thus applies a well-established interpretive canon: *expressio unius est exclusio alterius* (the express mention of one thing excludes others). See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927–29 & n.23 (1992) (discussing this canon as its alternative expression, *inclusion unius est exclusion alterius*). We do not assert that congressional defense simply violates general separation of powers principles. For a powerful critique of such theories, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) (arguing that “the Constitution adopts *no freestanding principle of separation of powers*” that should be judicially enforced).

³⁰ For discussions of the debate over the “unitary executive,” see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–71 (1992); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 70–78, 85–86, 114–16 (1994).

³¹ See U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed”); see also *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (*per curiam*) (“A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’”); Kelley, *supra* note 9, at 875–76 (asserting that “[t]he conduct of litigation by the Executive” is part of its power under the Take Care Clause). See generally *infra* note 62 and accompanying text and Part III (further explaining our view).

a statute but has enforced the law (or has otherwise taken the steps necessary to create a justiciable case or controversy).³² For example, while contending that DOMA was unconstitutional in *Windsor*, the Obama administration nonetheless denied a federal benefit (a tax exemption) that would have been available to an opposite-sex couple.³³ The executive's enforcement of the law ensured that there was an injured plaintiff with standing to mount a constitutional challenge to the statute and thereby provided an avenue for (possible) congressional intervention on behalf of the law.

Finally, although our argument relates to the ongoing debate over the President's so-called "duty to defend" constitutionally questionable statutes,³⁴ we do not seek to enter that debate here.³⁵ Even scholars who advocate a strong duty to defend acknowledge that the executive branch may decline to stand behind at least *some* federal

³² Notably, we assume for the purposes of this Article that when a lower court invalidates a federal law, the executive branch may appeal even if it has declined to defend the law. In *Windsor*, the Supreme Court concluded that the invalidation of federal law by a lower court imposed obligations on the government and therefore sustained an adversarial controversy between the government and the challenger of the law. 133 S. Ct. 2675, 2686 (2013). One of us, however, believes that the executive branch lacks standing to appeal when, as in *Windsor*, the executive refuses to defend a federal law. See Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. (forthcoming 2014) (manuscript at 7–8, 17–22) (on file with author) (contending that executive standing depends in large part on the powers conferred by Article II and that the executive lacks the Article II power to appeal when it declines to defend a federal law). For discussions of why the DOJ has incentives to facilitate judicial review, see Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 538–39 (2012); Grove, *supra* (manuscript at 30–33).

³³ *Windsor v. United States*, 699 F.3d 169, 175 (2d Cir. 2012) (noting that, after the death of her same-sex spouse, the plaintiff Edith Windsor was "denied the benefit of the spousal deduction for federal estate taxes . . . solely because" of DOMA).

³⁴ Compare Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1235 (2012) ("[T]he executive branch should enforce and defend statutes such as Don't Ask, Don't Tell and DOMA—even when it views them as wrongheaded, discriminatory, and indeed as shameful denials of equal protection."), and The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25, 25 (1981) (asserting that "[t]he Department appropriately refuses to defend an act of Congress only in the rare case" when the statute infringes on executive power or is clearly at odds with Supreme Court precedent), with Devins & Prakash, *supra* note 32, at 509 (arguing that the President should decline either to enforce or defend laws that he views as unconstitutional), and Dalena Marcott, Note, *The Duty to Defend: What Is in the Best Interests of the World's Most Powerful Client?*, 92 GEO. L.J. 1309, 1309 (2004) ("[T]he duty to defend should not extend to statutes the Executive considers unconstitutional.").

³⁵ One of us has already taken a position in the debate. See Devins & Prakash, *supra* note 32, at 509.

laws.³⁶ We seek to demonstrate, contrary to the prevailing wisdom,³⁷ that Congress may not in such cases step in to defend federal statutes in place of the executive. But the Constitution does give the House and the Senate other important mechanisms to challenge the executive, both in and outside of court.

A. Constitutional Text and Structure

Much of our structural Constitution is devoted to defining—and constraining—the power of Congress. Article I provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,” thereby granting Congress the predominant role in the enactment of federal law.³⁸ But the Constitution further specifies that Congress may enact laws only through the cumbersome process of bicameralism and presentment.³⁹ This process, which creates a supermajority requirement for every federal law, helps ensure that the exercise of legislative power is carried out only after thorough deliberation and only with the assent of a broad political coalition.⁴⁰ Article I, Section 8, in turn, further limits the exercise of Congress’s lawmaking power to certain enumerated subject matters (augmented, of course, by the authority to make all laws that are “necessary” and “proper” for carrying out those powers).⁴¹

The Constitution not only circumscribes the manner in which Congress enacts laws but also sharply limits its control over the implementation of those laws. This strict separation of powers was a decisive break from the constitutional structures existing in the state and federal governments under the Articles of Confederation. Under the early American state constitutions from 1776 to 1787, the state legislatures had substantial control over the execution of the laws. Most leg-

³⁶ For example, virtually all scholars seem to accept the executive’s refusal to defend statutes that are contrary to clearly established Supreme Court precedent (although they may dispute how “clear” the invalidity must be). See Meltzer, *supra* note 34, at 1193–94; see also Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382, 384 (1986) (arguing that “when judicial review has been properly instituted,” the executive may refuse to defend statutes seen as unconstitutional).

³⁷ For example, former Solicitor General Drew Days suggested that “[b]ecause both houses of Congress now have the formal capacity to represent themselves in court, . . . the need for Solicitors General to presume the constitutionality of, and defend in court, the acts of Congress” may be “less than it once was.” Drew S. Days III, *In Search of the Solicitor General’s Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 502 (1995).

³⁸ U.S. CONST. art. I, § 1.

³⁹ See *id.* art. I, § 7.

⁴⁰ See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339 (2001); see also JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 233–36 (4th ed. 1971) (suggesting that enacting legislation in a bicameral legislature will require a supermajority).

⁴¹ U.S. CONST. art. I, § 8.

islatures selected the governor on an annual basis⁴² and had the power to appoint and remove many other administrative officials, including (in some cases) the attorney general.⁴³ At the federal level, there was no executive, so the Continental Congress served in both a legislative and an executive capacity, supervising the case-by-case administration of military affairs, foreign affairs, and finance⁴⁴ and overseeing any litigation that arose out of these activities.⁴⁵ But this multimember body proved largely “incompetent” at exercising these administrative tasks.⁴⁶

Against this background, the U.S. Constitution clearly separates the enactment and implementation of federal law. First, Congress has no role in the selection of the head of the executive branch.⁴⁷ The President is independently elected by and accountable to the people through the Electoral College system—a process that expressly excludes members of Congress.⁴⁸

Nor may Congress appoint any other executive or administrative official. The President is responsible for nominating all “Officers of the United States.”⁴⁹ Although the Senate must confirm such high-ranking officers, “they cannot themselves *choose*—they can only ratify or reject the choice” of the President, leaving him with the

⁴² See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 86 (1985) (observing that “only three states had governors who served more than one-year terms” and that “[m]ost of the traditional executive power was vested in state legislatures”); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 139–40 (1969) (noting that the legislatures in most states elected their executives on an annual basis).

⁴³ See WOOD, *supra* note 42, at 138–39, 141–42 (noting that the legislature frequently had the power to appoint and to impeach administrative officials and magistrates); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 *GEO. WASH. L. REV.* 596, 604 (1989) (noting that attorneys general were appointed by state legislatures in Virginia, North Carolina, and South Carolina).

⁴⁴ See ARTICLES OF CONFEDERATION of 1781 arts. VIII, IX (giving the Continental Congress authority over military, foreign, and financial affairs); CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 55–56 (1969) (noting how even before the Articles of Confederation went into effect in 1781, the Continental Congress exercised these powers as a matter of practical necessity).

⁴⁵ See NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789–1990*, at 44 (1992) (observing that “the Continental Congress found it necessary to appoint attorneys to prosecute” cases in state court, “generally over debts incurred” during the Revolutionary War).

⁴⁶ Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1273 (2006) (“[T]he Continental Congress attempted to administer military affairs, finance, and foreign affairs by either ad hoc committees or the Committee of the Whole. Time and again this system proved incompetent.”).

⁴⁷ See U.S. CONST. art. II, § 1; see also McDONALD, *supra* note 42, at 243–47, 250–52 (describing how the delegates considered but ultimately rejected the idea of an executive selected by the legislative branch).

⁴⁸ Article II provides that “no Senator or Representative . . . shall be appointed an Elector” with the authority to vote on the President. U.S. CONST. art. II, § 1, cl. 2.

⁴⁹ See *id.* art. II, § 2, cl. 2.

power to select an alternative.⁵⁰ And neither chamber of Congress has a role in the selection of inferior officers. Instead, Congress may “by Law” (enacted through bicameralism and presentment) designate the President, Heads of Departments, or Courts of Law to choose those officers.⁵¹ Congress may not confer the appointment power on itself.

Other provisions reinforce this structural separation of legislative and executive power. The Incompatibility Clause expressly prohibits members of Congress from serving in any executive position during their tenure in office.⁵² Although the Clause was originally designed to prevent corruption in the legislature,⁵³ the Clause today serves to prevent “a fusion of the executive and legislative powers.”⁵⁴ “The Clause assures that different persons will write and execute the laws, creating the means and motives that keep the branches separate.”⁵⁵ Likewise, the Bill of Attainder Clause⁵⁶ “prevents the legislature from serving in two capacities”—as “law creator and law enforcer.”⁵⁷

The Constitution specifies only three respects in which any part of Congress may influence the implementation of federal law. First, the Senate has the power to confirm or reject high-ranking officers nominated by the President.⁵⁸ Second, Congress may specify the duties of executive officials through laws enacted via bicameralism and presentment.⁵⁹ Finally, Congress has the power to remove federal officers through impeachment.⁶⁰

Congress, however, has no direct control over the implementation of federal statutes, including the defense of laws in court. Litigation over the meaning and constitutionality of federal statutes is a

⁵⁰ THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the Senate “may defeat one choice of the Executive” but “could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite”).

⁵¹ U.S. CONST. art. II, § 2, cl. 2 (“[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

⁵² See *id.* art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

⁵³ As Steven Calabresi and Joan Larsen have documented, the Framers were concerned that the President would follow the practice of the British monarch and use his control over appointments to influence the legislature. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1052–66, 1078 (1994).

⁵⁴ *Id.* at 1118.

⁵⁵ Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 228 (2007).

⁵⁶ U.S. CONST. art. I, § 9, cl. 3.

⁵⁷ Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 308–09 (1989).

⁵⁸ U.S. CONST. art. II, § 2, cl. 2.

⁵⁹ See *id.* art. I, § 7, cl. 2.

⁶⁰ See *id.* art. I, § 2, cl. 5, art. I, § 3, cl. 6.

crucial part of the execution of federal law. If a court invalidates a statute, the government can no longer enforce that law against future violators.⁶¹ Even a narrow construction of a law significantly impacts future enforcement efforts. That is undoubtedly why most jurists and scholars assume that the defense of federal statutes falls within the responsibilities of the executive branch under the Take Care Clause.⁶² (The only area of disagreement is whether the executive must defend a statute that it views as unconstitutional, or whether its obligation to faithfully execute the Constitution takes precedence.)⁶³ Congress, by contrast, has no similar constitutional license to defend federal statutory commands in court.

There is only one area in which the Constitution permits any part of Congress to engage in both “rulemaking” and “implementation.” Article I gives each chamber of Congress control over its internal procedures. Thus, each chamber may establish “the Rules of its Proceedings,”⁶⁴ “punish its Members for disorderly Behaviour,” and (with the consent of two-thirds) even expel a member.⁶⁵ In this context, the House and the Senate are each permitted to serve in both a “legislative” and an “executive” capacity, creating and enforcing rules to govern their internal chamber affairs. This power enables the House and the Senate to control the manner in which bills are considered within their walls, including the power to subpoena witnesses and to seek judicial enforcement of such subpoenas. But the Constitution does not give Congress (or any part of it) the power to implement statutes enacted through bicameralism and presentment.

B. The Early Adherence to This Structural Division

From the outset, Congress delegated government litigation to persons outside of its control—primarily to executive officials. Scholars have long disputed whether this history supports the concept of a “unitary executive”—that is, the theory that the President must have direct control over those executing the laws.⁶⁶ But regardless of how

⁶¹ See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

⁶² See *supra* notes 31–36 and accompanying text. We return to this issue below. See *infra* Part III.

⁶³ See *supra* notes 34–36 and accompanying text; *infra* Part II.C.

⁶⁴ U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

⁶⁵ *Id.* art. I, § 5, cl. 1–2 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and . . . [may] compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

⁶⁶ Compare, e.g., Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 633–38 (arguing

one views the history for purposes of that debate, one thing seems clear: Congress did not control litigation over federal statutes. The House and the Senate supervised litigation in only one area: implementation of the “Rules of . . . Proceedings” of their respective chambers.⁶⁷

The early Congress relied on an array of actors to represent the interests of the United States in federal court. The Attorney General was the government’s exclusive representative in the Supreme Court.⁶⁸ But the Attorney General had little control over government litigation in the lower courts. The Judiciary Act of 1789 provided that most lower-court litigation was to be handled by local district attorneys, who did not report to the Attorney General.⁶⁹ And lower court litigation over government debts was assigned to yet another official—the Comptroller of the Treasury.⁷⁰ Congress also delegated some litigation tasks to private parties—as evidenced by the *qui tam* statutes enacted during this period, which allowed private parties to bring suit on behalf of the United States.⁷¹

Yet Congress consistently adhered to the constitutional limits on its own authority in establishing these enforcement regimes, retaining control over government litigators only through the mechanisms specified in the Constitution. For example, when Congress sought to “direct” the Attorney General to file suit on behalf of Revolutionary War

that history does not clearly show that the President must control the Attorney General’s actions), and Lessig & Sunstein, *supra* note 30, at 2, 16–22, 85–86 (asserting that historical evidence does not support unitary executive theory), with STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 8 (2008) (arguing for presidential control), and Saikrishna Prakash, *The Chief Prosecutor*, 73 *Geo. Wash. L. Rev.* 521, 546 (2005) (observing how the historical evidence suggests that the Attorney General is an “executive officer[] under presidential control”).

⁶⁷ See U.S. CONST. art. I, § 5, cl. 2.

⁶⁸ See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (authorizing the attorney general “to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned”).

⁶⁹ See *id.* (requiring each district attorney “to prosecute [all] crimes . . . and all civil actions in which the United States shall be concerned, except before the supreme court”); HOMER CUMMINGS & CARL McFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 142 (1937) (noting the Attorney General’s lack of direct control over local district attorneys).

⁷⁰ See An Act to Establish the Treasury Department, ch. 12, § 3, 2 Stat. 66 (1789) (providing that the Comptroller “shall direct prosecutions . . . for debts” due to the United States).

⁷¹ See Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 *Am. U. L. Rev.* 275, 293 (1989) (“Congress enacted a web of civil *qui tam* provisions that authorized victims and non-victims alike to help enforce the criminal laws.”). However, in a historical survey, Professors Caleb Nelson and Ann Woolhandler downplay the importance of these *qui tam* statutes. See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *Mich. L. Rev.* 689, 727, 724–31 (2004) (asserting that “the *qui tam* statutes adopted by the First Congress gave rise to little actual litigation, and subsequent Congresses rarely used the device” (citations omitted)).

veterans and their heirs (for the recovery of pension benefits), it passed a statute imposing the requirement.⁷² Likewise, when the Senate in 1800 concluded that a newspaper editor should be prosecuted for violating the Sedition Act (for allegedly “malicious publications” about the Senate), it asked President John Adams to instruct the district attorney to bring the prosecution.⁷³ The Senate did not claim that it could *itself* order the executive to enforce federal statutory commands.

The early Congress seems to have been equally restrained in dealing with the Comptroller of the Treasury.⁷⁴ In the debates over that office, James Madison worried that the Comptroller would not be sufficiently independent of the President.⁷⁵ But he recognized that the official would answer to Congress only through the appointment, removal, and statutory mechanisms laid out in the Constitution:

[The Comptroller] will always be dependent upon the Legislature [H]e will be dependent upon the Senate, because they must consent to his election for every term of years; and he will be dependent upon this House, through the means of impeachment, and the power we shall reserve over his salary [By these] means we shall effectually secure the dependence of this officer upon the Government.⁷⁶

We have not uncovered any evidence that the early Congress sought to control litigation over federal statutes. The House and the

⁷² See Act of Feb. 28, 1793, ch. 17, § 3, 1 Stat. 324, 325 (entitled “An Act to Regulate the Claims to Invalid Pensions”) (“[I]t shall be the duty of the Secretary at War, in conjunction with the Attorney General, to take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States, on the validity of any such rights claimed”); see also Bloch, *supra* note 66, at 582 & n.72, 610 n.163 (asserting that Congress “even occasionally ordered the Attorney General to bring specific legal actions” and citing, as the only example, the 1793 statute).

⁷³ See 10 ANNALS OF CONG. 184 (1800) (passing a resolution asking the President “to instruct the proper law officer to commence and carry on a prosecution against William Duane, editor of the newspaper called the Aurora, for certain false, defamatory, scandalous, and malicious publications” about the Senate); see also Prakash, *supra* note 66, at 558–59, 561 (discussing the prosecution).

⁷⁴ Notably, the evidence about the Comptroller is instructive. The first Congress was reluctant to cede control over the government’s financial affairs to administrative officials and, for that reason, kept a close eye on the Treasury Department. Indeed, some scholars have referred to the Treasury as an “agent” of Congress. *E.g.*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD: 1789–1801, at 42 (1997). *But see* Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 647–51 (1994) (disputing this characterization and arguing that the Treasury Department was an “executive department” responsible to the President). Yet it does not appear that Congress sought to control the Comptroller’s litigation activities.

⁷⁵ See 1 ANNALS OF CONG. 635–36 (Joseph Gales ed., 1834) (statement of James Madison, June 29, 1789) (arguing that the Comptroller should be appointed for a term of years to ensure his independence from the President because he would exercise some quasi-judicial duties).

⁷⁶ *Id.* at 636 (statement of James Madison, June 29, 1789).

Senate did, however, engage in both rulemaking and enforcement in the one area permitted by the Constitution: administering their internal chamber affairs. From the outset, both chambers asserted the power to compel witnesses to testify before them, to request documents, and to hold noncomplying individuals in “contempt.”⁷⁷

When these internal matters ended up in court, the House or the Senate controlled the litigation. For example, in 1818, the House of Representatives found John Anderson in contempt for attempting to bribe members of the House.⁷⁸ When Anderson brought suit to challenge that contempt finding,⁷⁹ the House hired then-Attorney General William Wirt, in his private capacity, to represent the chamber in the case.⁸⁰ (It was common during this early period for the Attorney General to supplement his modest income through private practice.)⁸¹ The Supreme Court in *Anderson v. Dunn*⁸² affirmed the power of the House of Representatives to hold nonmembers in contempt for interfering with chamber proceedings. The Court declared that “the right of the respective Houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence.”⁸³

C. Congress Declined to Defend Federal Statutes Even in the Face of Executive Non-Defense

Congress continued to adhere to the separation between lawmaking and implementation throughout the nineteenth and most of the twentieth century. That was true even when the executive branch de-

⁷⁷ See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1143 (2009) (recognizing that the contempt power should be seen as “fall[ing] within each house’s authority to ‘determine the Rules of its Proceedings’” (quoting U.S. CONST. art. I, § 5, cl. 2)). For a more detailed account of an early case, see Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189, 190–92 (1967). For additional discussion, see *infra* Part I.E.

⁷⁸ See Moreland, *supra* note 77, at 194–95 (“The first case which resulted in a court test of the authority of a House of Congress to commit for contempt occurred in 1818.”).

⁷⁹ As was customary in contempt actions at the time, the sergeant at arms of the House arrested Anderson and confined him in the House jail. See *id.*; Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 87–88 (2011) (discussing this “inherent contempt” procedure). Anderson filed suit against the sergeant at arms for false imprisonment and assault and battery. Moreland, *supra* note 77, at 195–96.

⁸⁰ See Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONGRESS & THE PRESIDENCY 131, 134 (1993) (noting that the Attorney General was paid \$500 for his services). As discussed above, the Attorney General’s official duties were limited to Supreme Court litigation, so the House had to hire him in his private capacity in order for him to represent the chamber in the lower courts.

⁸¹ See BAKER, *supra* note 45, at 58; see also Bloch, *supra* note 66, at 567 & n.21 (noting that during this period the Attorney General earned a much lower salary than other high-ranking executive officials).

⁸² 19 U.S. 204 (1821).

⁸³ *Id.* at 229. Although the Court affirmed this contempt power, it also stated “that imprisonment must terminate with [the] adjournment” of Congress. *Id.* at 231.

clined to defend a federal law. Although members of Congress occasionally appeared as amici in such cases, Congress made no significant effort to establish a “legislative attorney general” with the power to intervene on behalf of federal laws. In fact, in the wake of several instances of executive non-defense, Congress *expanded* the executive’s authority over constitutional litigation—by authorizing the Department of Justice to intervene in private suits involving constitutional questions.

The Supreme Court, not Congress, introduced the concept of a member of Congress serving as amicus in support of a federal statute. *Myers v. United States*⁸⁴ was the first case in which the executive branch declined to defend a federal law. *Myers* involved an 1876 statute, which provided that the President could remove postmasters only “by and with the advice and consent of the Senate.”⁸⁵ When Postmaster Frank Myers challenged the President’s decision to discharge him without seeking the Senate’s approval,⁸⁶ the Solicitor General responded by arguing that the removal restriction was unconstitutional because the President had an “unqualified” power to remove executive and administrative officials.⁸⁷

During the early briefing and argument stages of the case, Myers was the only litigant defending the 1876 law in the Supreme Court.⁸⁸ But after a lackluster performance by Myers’s attorney,⁸⁹ the Court invited Senator George Pepper, a politician who also maintained a successful private legal practice,⁹⁰ to appear as amicus to defend the federal law.⁹¹ The Supreme Court applauded Senator Pepper for his

⁸⁴ 272 U.S. 52 (1926).

⁸⁵ *Id.* at 106–08 (quoting the Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80).

⁸⁶ The case arose out of President Woodrow Wilson’s decision to dismiss Frank Myers, but the lawsuit was filed after Wilson left office—during the administration of President Warren Harding. See Saikrishna Prakash, *The Story of Myers and its Wayward Successors: Going Postal on the Removal Power*, in *PRESIDENTIAL POWER STORIES* 165, 165–70 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

⁸⁷ Brief for the United States, *Myers v. United States*, 272 U.S. 52 (1926) (No. 2), in 24 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 41, 72–73 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *LANDMARK BRIEFS*].

⁸⁸ See Plaintiff’s Brief, *Myers v. United States*, 272 U.S. 52 (1926) (No. 2), in 24 *LANDMARK BRIEFS*, *supra* note 87, at 3, 20, 23–29 (arguing that Congress’s power to create offices allows it to “attach such conditions . . . as it sees fit” to the offices).

⁸⁹ See Prakash, *supra* note 86, at 171 (recounting that Myers’s counsel, for reasons that are unclear, did not appear at the first two scheduled Supreme Court oral arguments in the case).

⁹⁰ GEORGE WHARTON PEPPER, *PHILADELPHIA LAWYER: AN AUTOBIOGRAPHY* 360 (1944) (“While I was in the Senate, I maintained contact with my law office and argued as many cases as possible.”).

⁹¹ See MORTON KELLER, *IN DEFENSE OF YESTERDAY: JAMES M. BECK AND THE POLITICS OF CONSERVATISM 1861–1936*, at 179 (1958); PEPPER, *supra* note 90, at 361.

“able brief and argument as a friend of the Court.”⁹² But the Court ultimately invalidated the law, agreeing with the executive that the President had an “unrestricted” removal authority.⁹³

The Solicitor General again advanced an expansive conception of presidential power in the *Pocket Veto Case*.⁹⁴ As the title suggests, the case involved the President’s power to “pocket veto” (by failing to sign) bills that are presented to him less than ten days before an “adjournment” of Congress.⁹⁵ (The “pocket veto” has often been viewed as controversial because it enables the President to kill a measure without returning it to Congress for a possible veto override.)⁹⁶ The Solicitor General argued for a broad construction of the term “adjournment,” urging that the President could pocket veto a measure whenever Congress was not in session.⁹⁷

The “pocket veto” was a subject of concern to a number of legislators during that era. The House Judiciary Committee issued a report in February 1927 advocating a narrow construction of the President’s pocket veto power.⁹⁸ There was, however, no broad effort in Congress to participate in the *Pocket Veto Case*. The Senate showed no interest in the lawsuit. Nor did the House as a whole enter the case. Instead, Representative Hatton Sumners appeared as *amicus curiae* only on behalf of the House Judiciary Committee.⁹⁹ Although the Supreme Court thanked Sumners for his “forcible” arguments, the Court

⁹² *Myers v. United States*, 272 U.S. 52, 176–77 (1926).

⁹³ *Id.* at 176.

⁹⁴ *The Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville & Lake Indian Tribes or Bands of the State of Wash. v. United States (The Pocket Veto Case)*, 279 U.S. 655, 675 (1929).

⁹⁵ *Id.* at 672; *see also* U.S. CONST. art. I, § 7, cl. 2 (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”).

⁹⁶ *See, e.g.,* Benson K. Whitney, Comment, *Barnes v. Kline: Picking the President’s Pocket?*, 70 MINN. L. REV. 1149, 1177–78 (1986) (contending that Presidents have often abused their pocket veto power).

⁹⁷ *See* Brief for the United States at 5, *The Pocket Veto Case*, 279 U.S. 655 (1929) (No. 565) (arguing that “Congress loses its opportunity to pass a bill over the President’s disapproval by not being in session”). The suit was brought by Indian tribes to enforce a law that, if valid, would enable them to bring monetary claims against the federal government. *See* Brief for Petitioners at 2, *The Pocket Veto Case*, 279 U.S. 655 (1929) (No. 565). The tribes argued that the President could pocket veto a measure only at the end of the two-year life cycle of a given Congress. *See id.* at 6.

⁹⁸ *See* H.R. REP. NO. 69-2054, at 4 (1927) (asserting that the President could pocket veto a measure only at the end of a two-year life cycle of a given Congress).

⁹⁹ *See* Motion of Hatton W. Sumners for Leave to File a Brief as *Amicus Curiae*, and Brief of *Amicus Curiae* at 1, *The Pocket Veto Case*, 279 U.S. 655 (1929) (No. 565) (stating that he was seeking to file the *amicus* brief “pursuant to a resolution” of the House Judiciary Committee).

agreed with the Solicitor General's construction of the pocket veto power.¹⁰⁰

No member of Congress participated in the next case in which the Solicitor General declined to defend a federal law.¹⁰¹ *Humphrey's Executor v. United States*¹⁰² involved President Franklin Roosevelt's decision to remove William E. Humphrey, a pro-business Republican,¹⁰³ from the Federal Trade Commission. Although the Federal Trade Commission Act permitted removal only in cases of "inefficiency, neglect of duty, or malfeasance in office,"¹⁰⁴ the President opted to dismiss Humphrey without giving a reason.¹⁰⁵

Several members of Congress raised questions about the legality of Humphrey's removal.¹⁰⁶ Furthermore, once Humphrey filed suit to challenge his termination,¹⁰⁷ there were suggestions that "Congress" should participate in the litigation. In testimony before a Senate committee, Humphrey himself urged the Senate to appoint counsel in his case, declaring that he could "not conceive of Congress surrendering [its] great power" to create independent agencies "without protest" from either the House or the Senate.¹⁰⁸ And during the debates over the confirmation of Humphrey's successor, George Mathews, Republican Senator Daniel Hastings argued that the Senate

¹⁰⁰ The Pocket Veto Case, 279 U.S. 655, 673, 691–92 (1929).

¹⁰¹ Notably, members of Congress participated in other cases. For example, the Senate approved a resolution to appoint counsel to appear in the unusual case of *United States v. Smith*, 286 U.S. 6 (1932). The case involved the appointment of George Otis Smith to the Federal Power Commission. The Senate initially confirmed Smith. *See id.* at 27. But a group of progressive Senators—outraged by Smith's decision in his first few days of office to fire progressive staff members—later led an effort to revoke that confirmation. They claimed his confirmation was not "final" under the Senate's rules because there was still time to reconsider the initial vote. *See* H.K., Comment, *Constitutional Law: Conclusiveness of Consent of Senate to Presidential Appointment*, 31 MICH. L. REV. 77, 77–78 & n.1 (1932) (describing the background of the case). Notably, the Senate did not bring suit in the name of the United States. Instead, the Senate asked the U.S. Attorney to file suit in the local D.C. courts, which then certified to the U.S. Supreme Court the issue of whether Smith "lawfully" held his office. *See Smith*, 286 U.S. at 26–27. The Supreme Court unanimously held that the Senate could not revoke its confirmation of Smith. *See id.* at 48–49.

¹⁰² 295 U.S. 602 (1935).

¹⁰³ *See* WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 54–55, 60 (1995).

¹⁰⁴ Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 718 (1914) (codified as amended at 15 U.S.C. § 41 (2012)).

¹⁰⁵ *See Humphrey's Executor*, 295 U.S. at 619.

¹⁰⁶ *See* 78 CONG. REC. 1679 (1934) (statement of Sen. Simeon Fess, R-Ohio) (criticizing Roosevelt for removing a member of an "independent commission" without any evidence of "malfeasance"); *id.* at 1290 (statement of Rep. Joseph Hooper, R-Mich.) (arguing that Roosevelt found Humphrey "objectionable" only because he was "a real Republican").

¹⁰⁷ *See* LEUCHTENBURG, *supra* note 103, at 62–63.

¹⁰⁸ *The Confirmation of George C. Mathews to Be a Member of the Federal Trade Commission: Hearing Before the S. Comm. on Interstate Commerce*, 73d Cong. 3 (1934) (statement of William Humphrey) (testifying at his successor's confirmation hearing).

should adopt a resolution authorizing the appointment of counsel.¹⁰⁹ He stated:

I think the Senate at this time has a duty to itself to perform. I think we ought not casually to overlook this violation of the intent of Congress by this action of the President. It is true that the ultimate place where the question must be decided is in the courts; but I think we ought to do more than register a protest in the Senate. I think we ought to . . . select[] [our] own counsel to present the matter to the courts¹¹⁰

The Senate, however, took no action on Senator Hasting's proposal and instead simply confirmed Mathews by a unanimous vote.¹¹¹ (The Supreme Court later held that Roosevelt's removal of Humphrey was unlawful.)¹¹²

As the above survey demonstrates, in less than ten years, the executive branch had on three occasions advocated a broad construction of presidential power at the expense of Congress's institutional authority. But these cases did not lead Congress to question the executive's role in defending federal statutes, nor did they lead to an effort for a "legislative attorney general." On the contrary, just two years after *Humphrey's Executor*, Congress *expanded* the executive branch's authority to defend federal laws in court.

In 1937, only six years after facing off against the executive in the *Pocket Veto Case*, Representative Hatton Sumners sponsored legislation that would allow the Attorney General to intervene in any lawsuit involving the constitutionality of a federal statute.¹¹³ Sumners expressed confidence that the Attorney General, "the great law officer of the United States," would be "the best prepared of anybody to defend an act of the United States Congress when it is challenged."¹¹⁴

During the debates over the measure, a few representatives wondered whether it would compel the Attorney General "to defend the constitutionality of [an] act . . . against his conviction that it is unconstitutional."¹¹⁵ The proponents responded that "there [was] no such compulsion whatever," although they anticipated that the Attorney General would in practice intervene on behalf of federal laws.¹¹⁶ But Representative John O'Connor probed the matter further, reminding Sumners that "[s]ome time ago [Sumners] appeared before the Supreme Court, in addition to the Attorney General" to debate the valid-

¹⁰⁹ 78 CONG. REC. 1684 (1934) (statement of Sen. Daniel Hastings, R-Del.).

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *See Humphrey's Executor v. United States*, 295 U.S. 602, 629, 631-32 (1935).

¹¹³ *See* 81 CONG. REC. 3254 (1937); H.R. REP. NO. 75-212, at 1-2 (1937).

¹¹⁴ 81 CONG. REC. 3255 (1937) (statement of Rep. Hatton Sumners, D-Tex.).

¹¹⁵ *Id.* at 3268 (statement of Rep. Edward Cox, D-Ga.).

¹¹⁶ *Id.* (statement of Rep. Earl Michener, R-Mich.).

ity of a federal law.¹¹⁷ O'Connor wondered how Sumners could now rely on "an appointee of the executive department" to "represent[] the legislative department . . . in the courts" when a federal law was challenged.¹¹⁸ Sumners replied: "[T]hat is his job."¹¹⁹ Sumners' proposal for DOJ intervention was later enacted into law.¹²⁰

Another important historical example of executive non-defense was the remarkable case of *United States v. Lovett*.¹²¹ The Urgent Deficiency Appropriation Act of 1943 included a rider stating that "[n]o part of any appropriation . . . shall be used . . . to pay any part of the salary" of three named federal officials—"Goodwin B. Watson, William E. Dodd, Junior, . . . and Robert Morss Lovett."¹²² The provision was the brainchild of anticommunist forces in the House of Representatives, who believed that the three men were part of an effort by communist sympathizers to infiltrate federal agencies.¹²³

The Senate viewed the rider as unconstitutional and on *four different occasions* voted to eliminate it from the statute.¹²⁴ But the House refused to enact any appropriations law without the rider, and the Senate ultimately relented.¹²⁵ President Roosevelt also "reluctantly signed" the measure "to avoid delaying" the nation's conduct of World War II.¹²⁶ But he sent a message to Congress declaring that the

¹¹⁷ *Id.* at 3269 (statement of Rep. John O'Connor, D-N.Y.). In the 1927 "pocket veto" dispute, Representative Sumners argued that Congress should never defer to the Attorney General's view on constitutional questions pertaining to legislative and executive powers, contending that the legislative branch should not "subordinate itself" to the executive "on a point of actual or potential conflict with that branch." 68 CONG. REC. 4935 (1927) (statement of Rep. Hatton Sumners, D-Tex.).

¹¹⁸ 81 CONG. REC. 3269 (1937) (statement of Rep. John O'Connor, D-N.Y.).

¹¹⁹ *Id.* (statement of Rep. Hatton Sumners, D-Tex.).

¹²⁰ See Act of Aug. 24, 1937, ch. 754, § 1, 50 Stat. 751 (codified at 28 U.S.C. § 2403 (2012)).

¹²¹ 328 U.S. 303 (1946). *Lovett* was the last case (prior to the creation of the House and Senate counsel) in which the executive branch declined to defend a federal statute on grounds of executive power.

¹²² Urgent Deficiency Appropriation Act of 1943, ch. 218, § 304, 57 Stat. 431, 450 (1943).

¹²³ See *Lovett*, 328 U.S. at 308 (noting how the statute originated from "the House of Representatives' feeling in the late thirties that many 'subversives' were occupying influential positions in the Government"); John Hart Ely, *United States v. Lovett: Litigating the Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1, 2-4 (1975).

¹²⁴ See 89 CONG. REC. 5023-24, 5603-06, 6407-16, 6691-95 (1943); see also *id.* at 5604 (statement of Sen. Scott Lucas, D-Ill.) ("To discharge the men under such circumstances is tantamount to convicting them as being Communist without a hearing or trial."); *id.* at 6694 (statement of Sen. Alben Barkley, D-Ky.) ("I regret what seems to me to have been the impetuosity of the other branch of the legislature in passing this bill of attainder.").

¹²⁵ See 89 CONG. REC. 7014 (1943) (approving the rider by a vote of 48-32); Ely, *supra* note 123, at 4 ("[I]t became clear that there would be no bill unless the Senate yielded . . . So yield it did, 48-32. 'Urgent appropriations' could wait no longer.").

¹²⁶ 89 CONG. REC. 7521 (1943) (reprinting the President's message of September 14, 1943) ("If it had been possible to veto the objectionable rider, . . . without delaying essential war appropriations, I should unhesitatingly have done so.").

rider was “not only unwise and discriminatory, but unconstitutional” as a bill of attainder.¹²⁷

Watson, Dodd, and Lovett subsequently filed suit in the Court of Claims to challenge their termination on constitutional grounds.¹²⁸ The executive branch agreed that their removal was unconstitutional, viewing the rider as both a bill of attainder and an infringement on the President’s Article II removal power (because Congress had itself “fired” three executive officials without impeaching them).¹²⁹ The Attorney General notified Congress that the Department of Justice would not defend the law and gave “Congress . . . an opportunity to be represented by their own counsel.”¹³⁰

The House of Representatives, by resolution, appointed “Special Counsel” to appear as *amicus curiae* to defend the rider in the Court of Claims.¹³¹ (Perhaps unsurprisingly, the Senate did not adopt a similar resolution authorizing defense of the rider that it had struggled so hard to delete.) The Court of Claims later issued a judgment in favor of the plaintiffs but did so in a splintered opinion that did not clearly settle the constitutional issues.¹³²

The question then arose of how to secure Supreme Court review. The House, of course, strongly disagreed with the lower court’s decision but could not appeal because it was only *amicus* in the case. Ultimately, at the request of the Special Counsel, the Solicitor General filed the certiorari petition, explaining that he “sought review . . . because of the Government’s belief that important constitu-

¹²⁷ *Id.*

¹²⁸ See *Lovett v. United States*, 66 F. Supp. 142, 143–44 (Ct. Cl. 1943).

¹²⁹ See Ely, *supra* note 123, at 16–17 (discussing the lower court “lines of attack”); *id.* at 28 (discussing the arguments asserted by the Attorney General for the executive branch). Solicitor General Howard McGrath made the same arguments in the Supreme Court. See Brief for the Petitioner, *United States v. Lovett*, 328 U.S. 303 (1946) (No. 809), in 44 LANDMARK BRIEFS, *supra* note 87, at 108 (arguing that the rider was “unconstitutional as a bill of attainder”).

¹³⁰ H.R. REP. NO. 78-1117, at 3–4 (1944) (reprinting letter from Attorney General Francis Biddle, dated December 6, 1943).

¹³¹ See 89 CONG. REC. 10,882 (1943) (“[W]hereas the House of Representatives has a specific interest in the subject matter of said proceedings . . . Therefore be it *Resolved*, That the special subcommittee [in charge of the investigation of subversive activity] is hereby authorized to appoint counsel to represent the United States . . .”). In the lower court proceedings, there was some confusion about precisely whom the “Special Counsel” represented. See *Lovett*, 66 F. Supp. at 143 (“The special counsel are designated variously in the record as representing the House, the Congress, the United States.”). The Supreme Court assumed that the Special Counsel appeared “on behalf of the Congress.” *United States v. Lovett*, 328 U.S. 303, 306 (1946). Given the background of the rider, it is doubtful that the House had the support of the Senate on the merits. And, indeed, the Senate did not appoint counsel to defend the rider in *Lovett*. The Senate and the executive did, however, agree to provide appropriations for the Special Counsel appointed by the House. See H.R.J. Res. 230, 78th Cong., 58 Stat. 113 (1944).

¹³² See *Lovett*, 66 F. Supp. at 148 (declining to decide whether the rider was constitutional because the plaintiffs were “entitled to recover in either event”).

tional issues are involved . . . and because *amici curiae*, representing the Congress . . . , [has] no independent means of access to the Court."¹³³ The Supreme Court agreed to hear the case and subsequently held that the rider was an unconstitutional bill of attainder.¹³⁴

D. Congress and the Defense of Federal Statutes

The above survey offers a few lessons about “congressional” defense of federal statutes. First, this history shows that “Congress” never asserted the power to defend federal statutes in court. In fact, Congress as a whole showed little interest in defending its work product against constitutional challenge. The only action clearly agreed to by Congress during this period was the Sumners statute, which expanded executive authority over constitutional litigation.¹³⁵

Second, even when individual members (or components) of Congress sought to participate in litigation, they did so as *amici curiae*. No part of Congress asserted the power to intervene as a party on behalf of federal laws. That was true even in *Lovett*—the only case (prior to *INS v. Chadha*)¹³⁶ in which a full chamber of Congress resolved to defend a federal statute. The Special Counsel appointed by the House appeared only as *amicus*—even though this status prevented the House from having a right to appeal.¹³⁷

Finally, this history also suggests that the willingness (or lack thereof) of members of Congress to defend federal statutes may depend largely on partisan, rather than institutional, concerns.¹³⁸ That certainly seems to explain Democratic Representative Sumners’s about-face on executive control over constitutional litigation. During the Republican administration of President Calvin Coolidge, in the midst of the pocket veto controversy, Sumners insisted that Congress should *never* “surrender[] its constitutional position . . . and

¹³³ Brief for the Petitioner, *United States v. Lovett*, 328 U.S. 303 (1946) (No. 809), in 44 LANDMARK BRIEFS, *supra* note 87, at 53. Although the Solicitor General agreed with the lower court’s ruling, the executive argued that it was still the “losing party” for purposes of appeal because it had been ordered to pay the salaries of terminated employees. *See id.*; Petition for Writs of Certiorari to the Court of Claims, *United States v. Lovett*, 328 U.S. 303 (1946) (No. 809), in 44 LANDMARK BRIEFS, *supra* note 87, at 13 (noting that the DOJ sought certiorari review at the Special Counsel’s request).

¹³⁴ *Lovett*, 328 U.S. at 315–16, 318.

¹³⁵ *See supra* notes 113–20 and accompanying text.

¹³⁶ 462 U.S. 919, 959 (1983); *see infra* Part III (discussing *Chadha*).

¹³⁷ *See Ely, supra* note 123, at 11 (noting that Congress’s “Special Counsel” was “officially an *amicus curiae*”).

¹³⁸ For additional discussion (documenting that court filings by today’s lawmakers are motivated by partisan, not institutional, concerns), *see infra* notes 150–54 and accompanying text.

subordinate[] itself” to executive constructions of federal statutes.¹³⁹ But a few years later, Sumners was happy to “surrender” to the Democratic administration of President Roosevelt—presumably because Sumners was confident that Roosevelt’s Attorney General (now “the great law officer of the United States”) would dutifully defend programs that Sumners favored.¹⁴⁰ Similar partisan motivations likely explain why the heavily Democratic House and Senate in 1935 remained on the sidelines of *Humphrey’s Executor*.

Although Congress’s lack of interest in the defense of federal statutes may seem surprising, this response in fact comports with the political and institutional incentives of the legislature. Outside of a handful of politically salient issues like DOMA, lawmakers rarely care about the defense of federal statutes. To start, legislators are primarily motivated by personal interests—reelection, advancing with their party, and furthering their own, their constituents’, and their party’s policy agenda.¹⁴¹ Correspondingly, lawmakers have little incentive to protect Congress’s institutional prerogatives; indeed, the individual and institutional interests of members of Congress are often in conflict with one another.¹⁴² On issues involving litigation authority, for example, Congress has an institutional interest in the DOJ defending federal statutes and advancing an expansive view of congressional power. At the same time, lawmakers might disapprove of a given statute and, in fact, prefer that the DOJ refuse to defend it. For example, Democrats supported the Obama administration’s refusal to defend DOMA.¹⁴³ If Mitt Romney had won the presidential contest in 2012, Republicans certainly would have supported his refusal to defend ongoing challenges to the Affordable Care Act.¹⁴⁴

¹³⁹ 68 CONG. REC. 4935 (1927) (statement of Rep. Hatton Sumners, D-Tex.) (“It is just as possible for this House, in effect, to change the Constitution defining its powers and duties . . . by a surrender We know the persuasive force . . . of precedent.”).

¹⁴⁰ 81 CONG. REC. 3255 (1937) (statement of Rep. Hatton Sumners, D-Tex.) (indicating support for allowing the Attorney General to intervene in certain cases).

¹⁴¹ See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 49–64 (1974); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1300–01 (2001) (noting how lawmakers are compelled to devote a substantial amount of their energy to fundraising, casework, and media appearances).

¹⁴² See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 144 (1999) (noting that lawmakers have “a strong incentive to free ride in favor of the local constituency” even though “all might benefit if they could cooperate in defending or advancing Congress’s power”).

¹⁴³ See Brief of Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny H. Hoyer—As *Amicus Curiae* in Support of Plaintiff-Appellee and Urging Affirmance, *Golinski v. U.S. Office of Pers. Mgmt.*, 680 F.3d 1104 (9th Cir. 2012) (Nos. 12-15388, 12-15409); Hennessey, *supra* note 23.

¹⁴⁴ More generally, litigation authority seems far removed from Congress’s principal concern, which is the substantive bottom line. Even though Congress and its committees would gain power by diffusing litigation authority (so that agency heads would work more

For these reasons, Congress's general unwillingness to defend federal statutes has continued to this day. From December 1975 to May 2011, the DOJ notified Congress that it would not defend seventy-five different statutory provisions.¹⁴⁵ In only five of these cases did either chamber step in to defend the federal law (sometimes as amicus, sometimes as intervenor).¹⁴⁶ Equally striking, outside of confirmation hearings (where Attorney General and Solicitor General nominees are sometimes asked about their willingness to defend federal laws at odds with the President's agenda), there are only three post-1978 episodes in which lawmakers expressed strong opposition to the DOJ's failure to defend a federal law (and one of these three is principally about the government's failure to enforce a federal statute).¹⁴⁷

The failure of the DOJ to defend federal legislation, by itself, seems to matter very little to Congress. Indeed, the House and the Senate are much more likely to file briefs in Supreme Court cases in which the DOJ is defending a federal law. Eleven of the sixteen Supreme Court cases in which counsel for each chamber have filed briefs involve the defense of federal statutes.¹⁴⁸ The simple explanation is that issue salience is far more important to lawmakers than the abstract question of whether the DOJ or some other entity is defending a federal law.

Congress's lack of institutional incentives to defend federal statutes is compounded by party polarization. Lawmakers see themselves as members of a party, not independent power brokers willing to cross

closely with Congress in crafting their legal policy agenda), lawmakers have bowed to the President's desire to centralize litigation authority within the DOJ. See Neal Devins & Michael Herz, *The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205, 218–22 (1998).

¹⁴⁵ See Devins & Prakash, *supra* note 32, at 561 (discussing an inventory of DOJ communications to Congress maintained by the Office of Senate Legal Counsel). Before 1978, the DOJ had no statutory obligation to inform Congress of its refusal to defend federal statutes. See Department of Justice Appropriation Authorization Act, Fiscal Year 1979, Pub. L. No. 95-624, § 13, 92 Stat. 3459, 3464–65 (1978) (codified as amended at 28 U.S.C. § 530D(a)(1)(B)(ii) (2012)).

¹⁴⁶ In addition to the House Bipartisan Legal Advisory Group participation in the DOMA litigation, the House or Senate counsel participated as a party or amicus in five other Supreme Court cases in which the DOJ refused to defend the constitutionality of a federal statute. See June 21, 2012 Memo from Nandor Kiss Re: Congressional Involvement in the Courts, at *6 [hereinafter Kiss Memorandum] (copy on file with authors).

¹⁴⁷ See Devins & Prakash, *supra* note 32, at 551–54. The two episodes that focused on the DOJ's failure to defend involved the high-salience issues of child pornography (an issue in which Democrats and Republicans alike joined forces to express outrage at the DOJ's refusal to defend a child pornography law on First Amendment grounds) and voluntary confessions (where Republican lawmakers held hearings about the Clinton administration's refusal to defend legislation from 1968 that sought to statutorily nullify *Miranda v. Arizona*). See *id.* at 552–54.

¹⁴⁸ See Kiss Memorandum, *supra* note 146, at *8–10.

party lines in order to pursue favored policies.¹⁴⁹ Consider, for example, the willingness of today's lawmakers to trade off congressional power in order to advance partisan political goals. In the DOMA case, although House Republican leadership directed the House counsel to intervene in the case and defend the law, 132 Democratic members filed briefs both arguing that DOMA is unconstitutional and calling attention to the fact that the House counsel "[did] not speak for a unified House" but, instead, was a mouthpiece for the Republican majority.¹⁵⁰ In the 2012 Affordable Care Act decision, *National Federation of Independent Business v. Sebelius*,¹⁵¹ it was Democrats supporting and Republicans seeking to limit congressional power. Forty-three Republican Senators and House Speaker John Boehner (on behalf of House Republicans) filed briefs seeking to limit Congress's commerce power¹⁵² (a power Republicans regularly invoke); Democratic leadership (party leaders and leaders of committees with jurisdiction over the ACA) filed a brief on behalf of all Democrats in support of a broad understanding of Congress's commerce power.¹⁵³

Congress is a poor advocate for its handiwork. Lawmakers rarely participate in the defense of federal statutes; when lawmakers do participate in such cases, they typically participate in cases where the DOJ is already defending the federal statute; in today's polarized Congress, lawmakers are as likely to file briefs seeking to limit congressional pre-

¹⁴⁹ Among other things, party polarization has resulted in a strengthening of party leaders (relative to committee chairs), an increasing commitment of each party to adhere to a unified party message, and an unwillingness of each party to seek bipartisan solutions. See Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 753–59 (2011) (summarizing literature on polarization's impact on Congress).

¹⁵⁰ Brief of Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny H. Hoyer—As *Amici Curiae* in Support of Plaintiff-Appellee and Urging Affirmance at 1, *Golinski v. U.S. Office of Pers. Mgmt.*, 680 F.3d 1104 (9th Cir. 2012) (Nos. 12-15388, 12-15409).

¹⁵¹ 132 S. Ct. 2566 (2012).

¹⁵² See Brief of Members of the United States Senate as *Amici Curiae* in Support of Petitioners on the Issue of Severability at 4, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-400); Brief of Speaker of the House John Boehner as *Amicus Curiae* in Support of Respondents on the Minimum Coverage Provision Issue at 2, *U.S. Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398).

¹⁵³ See Brief of Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi, and Congressional Leaders of Committees of Relevant Jurisdiction as *Amici Curiae* in Support of Petitioners (Minimum Coverage Provision) at 4–5, *Florida v. Dep't of Health & Human Servs.*, 132 S. Ct. 2566 (2012) (No. 11-398). More generally, a multimember body like Congress will tend to have more difficulty than the executive in adopting a unified, coherent litigation strategy. See Tara Leigh Grove, *A (Modest) Separation of Powers Success Story*, 87 NOTRE DAME L. REV. 1647, 1666–67 & n.97 (2012).

rogatives as they are to file briefs in support of congressional prerogatives.¹⁵⁴

E. Congressional Control over Internal House and Senate Proceedings

Although Congress has historically been a poor advocate for federal statutes, the House and the Senate have long asserted the power to conduct investigations and handle any litigation arising out of those investigations.¹⁵⁵ Notably, such proceedings have at times involved significant institutional battles with the executive branch. This pattern continues today. Although lawmakers almost never intervene in cases involving the non-defense of federal statutes,¹⁵⁶ other skirmishes with the executive branch are quite common. The power of each chamber to investigate executive wrongdoing has proven crucial to these institutional battles, especially when these skirmishes spill over to litigation with either the House or the Senate seeking judicial enforcement of congressional subpoenas. Between 2007 and 2013, for example, the House found several high-ranking officials from the Bush and Obama administrations in contempt of Congress and subsequently filed lawsuits against those officials.¹⁵⁷

While there is no provision of the Constitution expressly authorizing congressional inquiries, the executive, the courts, and Congress itself have always seen such power as essential to the legislative function—one that arises from each chamber's power to control its internal proceedings.¹⁵⁸ The power of Congress to seek and enforce

¹⁵⁴ When Congress was less polarized, lawmakers were more apt to come together to file bipartisan briefs in support of congressional power. Consider, for example, abortion filings. In a 1980 challenge to Hyde amendment limits on federal funding of abortion, 136 Republicans and 106 Democrats filed a truly bipartisan brief defending Congress's control over appropriations. See Brief of Rep. Jim Wright et al. as Amici Curiae at 1–6, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268). By 2006, however, when the Court heard the partial-birth abortion case *Gonzales v. Carhart*, the briefs were purely partisan. See Brief of Amici Curiae, 52 Members of Congress in Support of Planned Parenthood Federation, Inc., et al., and Motion for Leave to File Brief Out of Time in Support of Respondents LeRoy Carhart, M.D., et al., in Related Case No. 05-380, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Nos. 05-380, 05-1382); Amicus Brief of the American Center for Law and Justice, 78 Members of Congress, and the Committee to Protect the Ban on Partial Birth Abortion in Support of Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Nos. 05-380, 05-1382).

¹⁵⁵ See Moreland, *supra* note 77, at 225–30 (discussing House and Senate investigations and contempt actions in the nineteenth and early twentieth centuries).

¹⁵⁶ See *supra* Part I.D.

¹⁵⁷ See *infra* notes 190–96.

¹⁵⁸ In *McGrain v. Daugherty*, the Supreme Court observed that “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it.” 273 U.S. 135, 175 (1927); see also Chafetz, *supra* note 77, at 1143 (recognizing that the contempt power should be seen as “fall[ing] within each house’s authority to ‘determine the Rules of its Proceedings’”).

informational demands, including the power to punish for contempt, arises out of the power of Congress to investigate.¹⁵⁹ House and Senate practices, moreover, make clear that each house has complete control over its own investigations, including control of both the procedures used and information obtained.

Use of the power to investigate dates back to the birth of the Nation: the House's first investigation was in 1792 and the Senate's in 1818.¹⁶⁰ Indeed, the contempt power has been labeled a "constitutional backdrop," for it was exercised by both the English Parliament and the American colonial assemblies.¹⁶¹ At the federal Constitutional Convention, George Mason—reflecting the widely held view that "[e]ach House shall be the Judge of its own privileges"—emphasized that members of Congress "are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices."¹⁶²

The very first congressional inquiries highlight both lawmaker assertions of their inherent powers to investigate and presidential acquiescence in such assertions. Consider, for example, the House of Representatives' 1792 inquiry into Major-General Arthur St. Clair's failed raid against Native Americans residing in the Northwest Territory.¹⁶³ Before approving a resolution empowering it "to call for such persons, papers, and records, as may be necessary to assist their inquiries,"¹⁶⁴ lawmakers debated and rejected a resolution that "the President . . . be requested to institute an inquiry into the causes of the late defeat of the army under the command of . . . St. Clair."¹⁶⁵ Equally telling, before agreeing to have his Secretary of War Henry Knox produce all letters and documents concerning St. Clair's mission, President George Washington and his advisors—Thomas Jefferson, Alexander Hamilton, Edmund Randolph, and Knox—concluded that

¹⁵⁹ See generally Chafetz, *supra* note 77, at 1143–44 (discussing the structural rationale underlying Congress's investigative power); Moreland, *supra* note 77, at 189–94 (discussing the early development of Congress's power to punish for contempt and noting that "[t]he investigative power of Congress is intimately related to its power to punish for contempt").

¹⁶⁰ Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 46 (2009).

¹⁶¹ Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1854–59 (2012); see also Chafetz, *supra* note 77, at 1093–98, 1120–21 (discussing the use of the contempt power by the English Parliament and the colonial legislatures).

¹⁶² LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 5 (2004) (quoting George Mason and Charles Pinckney (internal quotation marks omitted)).

¹⁶³ St. Clair, rather than routing the native population in the area, fell victim to a surprise attack and lost almost half of his 1500 troops in less than a day. See TELFORD TAYLOR, *GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS* 17–18 (1955).

¹⁶⁴ 3 ANNALS OF CONG. 493 (1849).

¹⁶⁵ *Id.* at 490.

“the House could conduct an inquest, institute inquiries, and call for papers.”¹⁶⁶

Congress’s first assertion of its contempt power occurred in 1795, when the House held Robert Randall and Charles Whitney in contempt for attempting to bribe three members of the House.¹⁶⁷ In pursuing this matter, the House adopted extensive procedures governing its inquiry.¹⁶⁸ In lengthy legislative debates, no question was raised about the House’s contempt power; instead, early lawmakers (many of whom were also members of the Constitutional Convention) “substantially agreed that the [Constitution’s] grant of the legislative power to Congress carried with it by implication the power to punish for contempt.”¹⁶⁹ Four years later, the Senate exercised its contempt power for the first time. Like the House, the Senate—after extensive debate—concluded that it had an independent, inherent contempt power.¹⁷⁰

The power of the House and the Senate to pursue investigations independently is also revealed in the 1859–60 Senate hearings on the raid on Harpers Ferry.¹⁷¹ In a dispute involving the Senate—through its sergeant at arms—compelling the testimony of abolitionist Thaddeus Hyatt, Senator John Crittenden spoke of the Senate’s power to pursue “inquiries and investigations it thinks proper” and asserted that the Senate is capable of conducting an inquiry completely within its own power: “[T]here are inquiries of the one House or the other House, which each House has a right to conduct; which each has, from the beginning, exercised the power to conduct; and each has, from the beginning summoned witnesses.”¹⁷² Almost seventy years later, Attorney General Harlan Stone cited a related claim by Senator

166 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY: 1792–1974, at 4 (Arthur M. Schlesinger, Jr. & Roger Bruuns eds., 1975). In explaining why Washington convened a meeting of his advisors, Thomas Jefferson wrote:

The President he had called us, to consult, merely because it was the first example, and he wished that so far as it [should] become a precedent, it should be rightly conducted. He neither acknowledged nor denied, nor even doubted the propriety of what the house were doing, for he had not thought upon it

23 THE PAPERS OF THOMAS JEFFERSON 261–62 (Charles T. Cullen et al. eds., 1990).

167 2 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1599 (1907).

168 See TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34097, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 5 (2012).

169 C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691, 720 (1926).

170 See GARVEY & DOLAN, *supra* note 168, at 6.

171 See *McGrain v. Daugherty*, 273 U.S. 135, 161–62 (1927). The raid on Harpers Ferry was led by white abolitionist John Brown who attempted to start an armed slave revolt by seizing a weapons arsenal at Harpers Ferry. See *id.* (referencing the incident).

172 CONG. GLOBE, 36th Cong., 1st Sess. 1105 (1860).

Crittenden when filing a brief backing up Congress's investigative powers, namely: "[Does the Senate] require the concurrence of the other House to [summon witnesses]? It is a power of our own. If you have a right to do the thing of your own motion, you must have all powers that are necessary to do it."¹⁷³

In disputes with the executive branch, the House and the Senate have both used their authority to investigate alleged wrongdoing by executive officials. For example, in 1916, the House of Representatives investigated a U.S. district attorney in the Southern District of New York for alleged "high crimes and misdemeanors."¹⁷⁴ When the district attorney publicly criticized the proceeding, the House held him in contempt and had him arrested by its sergeant at arms.¹⁷⁵ Ten years later, a Senate committee investigated former Attorney General Harry Daugherty for his alleged failure to prosecute violations of the Sherman Antitrust Act and the Clayton Act.¹⁷⁶ When one witness (the Attorney General's brother Mally Daugherty) refused to comply with a subpoena for testimony, the Senate held him in contempt.¹⁷⁷

One of the most dramatic uses of this investigative power occurred during the Watergate era. The Watergate scandal arose out of a break-in into the Democratic headquarters at the Watergate Hotel in Washington, D.C.¹⁷⁸ Acting pursuant to a Senate resolution,¹⁷⁹ the Senate Select Committee on Campaign Activities investigated the break-in and subpoenaed a number of executive officials to testify.¹⁸⁰

The Senate committee subsequently issued subpoenas to President Richard Nixon requesting that he turn over tapes of conversations between the President and administration officials.¹⁸¹ When Nixon refused to comply, the Senate filed suit to enforce its subpoe-

¹⁷³ *McGrain*, 273 U.S. at 164.

¹⁷⁴ Chafetz, *supra* note 77, at 1137-38; *see also* *Marshall v. Gordon*, 243 U.S. 521, 530-31 (1917) (observing that the House was considering impeachment proceedings).

¹⁷⁵ *See Marshall*, 243 U.S. at 531-32. The Supreme Court subsequently granted the district attorney's petition for a writ of habeas corpus on the ground that his public criticism of the investigation did not interfere with the House's investigative authority. *See id.* at 545-46 (noting how the district attorney did not obstruct the performance of legislative duty).

¹⁷⁶ *See* 65 CONG. REC. 3299 (Feb. 29, 1924).

¹⁷⁷ *See McGrain*, 273 U.S. at 152-54; Moreland, *supra* note 77, at 219. The Supreme Court held that Mally Daugherty was not entitled to a writ of habeas corpus. *See McGrain*, 273 U.S. at 180 (concluding that the Senate was entitled to have Mally Daugherty give testimony).

¹⁷⁸ *See* 119 CONG. REC. 26,539 (1973).

¹⁷⁹ *See* 119 CONG. REC. 3849-51 (1973); 119 CONG. REC. 36,094-95 (1973).

¹⁸⁰ *See Presidential Campaign Activities of 1972—Senate Resolution 60: Hearing Before the S. Comm. on Presidential Campaign Activities*, 93d Cong. 1 (1974).

¹⁸¹ *See Legal Documents Relating to the Select Committee Hearings, in Presidential Campaign Activities of 1972—S. Res. 60: Hearing Before the S. Comm. on Presidential Campaign Activities*, App'x, 93d Cong. 569-76 (1974) (reprinting subpoenas).

nas.¹⁸² Nixon argued that the tapes were protected by “executive privilege.”¹⁸³ In the Senate committee’s lawsuit, the D.C. Circuit held that Nixon’s claim of executive privilege trumped the committee’s need for the material.¹⁸⁴ At the same time, the D.C. Circuit did not question the committee’s authority to pursue the litigation as part of its Article I investigative power. Indeed, Nixon—like several presidents before him—conceded that Congress may seek information (unless the President invokes executive privilege).¹⁸⁵

The Nixon case is revealing for one other reason: it highlights the extent to which each chamber of Congress is truly independent of the other and the rest of the government. The criminal investigation by Special Prosecutor Archibald Cox was entirely separate from the Senate litigation and, indeed, the U.S. Supreme Court rejected the executive privilege claims and ordered President Nixon to turn over the tapes in the criminal case.¹⁸⁶ More strikingly, the House Judiciary Committee had separately sought (and obtained) the tapes as part of its impeachment proceedings.¹⁸⁷ Neither the Senate nor Special Prosecutor Cox sought the tapes from the House; each entity operated separately from the other.

Lawmakers today continue to assert their Article I authority over internal House and Senate proceedings, including the power to investigate the executive branch. Perhaps not surprisingly in today’s polarized Congress, on issues implicating congressional power vis-à-vis the executive, Republican and Democratic attitudes now vary depend-

¹⁸² See *id.* at 543–52 (reprinting the complaint filed by the Senate Select Committee).

¹⁸³ See *id.* at 577–78 (reprinting a letter from President Nixon to the Senate Select Committee).

¹⁸⁴ Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974). The district court had previously dismissed the Senate committee’s suit on the ground that there was no statute granting federal jurisdiction over the case. See *id.* at 727. But, once Congress enacted a statute granting jurisdiction, the courts did not doubt the Senate’s power to bring the proceeding. See *id.* at 727–29.

¹⁸⁵ Nixon conceded that Congress had an Article I power to investigate and that the executive should withhold information “only in the most compelling circumstances.” Richard Nixon, Statement About Executive Privilege (Mar. 12, 1973), available at <http://www.presidency.ucsb.edu/ws/?pid=4137>. This view was longstanding. Thomas Jefferson advanced it in conjunction with the Washington administration’s decision to turn over information in the St. Clair investigation. See 23 THE PAPERS OF THOMAS JEFFERSON, *supra* note 166, at 262 (“[T]he Executive ought to communicate such papers as the public good would permit, and ought to refuse those the disclosure of which would injure the public.”). Likewise, William Howard Taft (writing as President, not as Chief Justice) remarked that “comity requires that the executive departments should turn over as fully as possible all the information they have to assist Congress or either House in the duty of legislation, but exceptional cases may arise” 3 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY: 1792–1974, at 2294 (Arthur M. Schlesinger & Roger Bruns eds., 1975).

¹⁸⁶ United States v. Nixon, 418 U.S. 683, 713 (1974). The President resigned from office two weeks later.

¹⁸⁷ MORTON ROSENBERG, CONG. RESEARCH SERV., RL30319, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 3–4 (2008).

ing on who sits in the White House.¹⁸⁸ Democrats view congressional oversight of the executive as integral to a well-functioning democracy when there is a Republican president; Republicans likewise believe in oversight when there is a Democratic president.¹⁸⁹ Consider, for example, recent flare-ups involving the Obama and George W. Bush administrations with the opposition party in Congress. In the Fast and Furious gun-running case, House Republicans sought documents from the DOJ concerning the Obama administration's failed operation to stem the flow of firearms to Mexican drug cartels.¹⁹⁰ From April 2011 to June 2012, House Republicans held eleven hearings about the operation and made numerous requests for DOJ documents.¹⁹¹ After the DOJ refused to provide certain documents (claiming executive privilege), the House voted both to find Attorney General Eric Holder in contempt and to launch a lawsuit to seek access to the requested documents.¹⁹² Four years earlier, when Democrats controlled the House and George W. Bush was president, a nearly identical script played out. At that time, House Democrats were investigating the dismissal of U.S. Attorneys by the Bush administration. After White House counsel Harriet Miers and Chief of Staff Josh Bolten—invoking executive privilege—refused to turn over docu-

¹⁸⁸ We do not mean to suggest that partisanship was irrelevant in earlier Congresses; however, Democrats and Republicans were far more willing to cross party lines and work together in some earlier Congresses. For example, Democrats and Republicans came together during the Watergate investigation when requesting documents from the White House and when voting to launch legal challenges in response to the White House's failure to turn over requested documents. See *The Impeachment Inquiry*, in CQ ALMANAC (30th ed. 1975), available at <http://library.cqpress.com/cqalmanac/document.php?id=cqal74-1223105&type=toc&num=10>.

¹⁸⁹ See David C.W. Parker & Matthew Dull, *Divided We Quarrel: The Politics of Congressional Investigations, 1947–2004*, 34 LEGIS. STUD. Q. 319, 335–36 (2009) (documenting that partisanship increasingly impacts congressional investigations of the executive); see also Philip Shenon, *As New 'Cop on the Beat,' Congressman Starts Patrol*, N.Y. TIMES, Feb. 6, 2007, at A18 (highlighting how Democratic lawmakers used oversight to monitor the George W. Bush administration); Representatives Darrell Issa & Fred Upton, Op-Ed, *Reclaiming the Right to Oversight: GOP-Led House to Revoke Team Obama's Free Pass*, WASH. TIMES (Nov. 27, 2010), <http://www.washingtontimes.com/news/2010/nov/27/reclaiming-the-right-to-oversight/> (advocating increased Congressional oversight to combat perceived overregulation under the Obama administration).

¹⁹⁰ Flock, *supra* note 6. The government allowed Mexican drug cartels to obtain thousands of weapons. The government planned to track the movement of these guns; however, the operation backfired and at least one U.S. federal agent was killed by one of these guns. *Id.*

¹⁹¹ See John Bresnahan & Seung Min Kim, *Attorney General Eric Holder Held in Contempt of Congress*, POLITICO (June 28, 2012, 4:43 PM), <http://www.politico.com/news/stories/0612/77988.html>.

¹⁹² See *supra* note 19 and accompanying text; see also Bresnahan & Kim, *supra* note 191. The House vote was almost exclusively along party lines, and most Democrats “marched off the floor in protest during the vote.” *Id.*

ments, the House found Miers and Bolten in contempt and filed a lawsuit against them.¹⁹³

These examples demonstrate that, even absent the power to intervene on behalf of federal laws, the House and the Senate may nonetheless go to court and independently engage in important institutional battles with the executive branch. In the Watergate era, a Senate investigation (and the legal proceedings arising out of it) led to the downfall of the President.¹⁹⁴ In 2008, the D.C. District Court rejected the Bush administration's claims that senior high-ranking officials had absolute immunity from compelled testimony to Congress; following that decision, Harriet Miers and Josh Bolten testified about the U.S. Attorney firings.¹⁹⁵ Today, Attorney General Holder faces the challenge over the Fast and Furious gun-running program.¹⁹⁶

The lesson here is simple: lawmaker incentives match the constitutional design. Lawmakers rarely care about the defense of federal statutes and, as such, Congress is generally a poor advocate for its handiwork. On the other hand, lawmakers often seek partisan advantage through investigations of the executive. Consequently, in matters touching on internal proceedings, the House or the Senate may well prove a vigorous advocate for its prerogatives.

II

THE BICAMERALISM NORM: SEPARATING THE HOUSE AND THE SENATE

Congress did not seriously consider the creation of a "legislative attorney general" or "congressional counsel" until the 1970s. But Congress did not establish a legislative attorney general. Instead, the House and the Senate established separate offices to provide legal advice to their respective chambers. Although (as discussed below) the development of separate counsel is unsurprising, given the longstanding institutional divisions between the House and the Senate, this de-

¹⁹³ See Shenon, *supra* note 189. Like the Holder episode, the House vote was spearheaded by the majority party, and members of the minority party left the House floor in protest. *See id.*

¹⁹⁴ See John P. MacKenzie, *Court Orders Nixon to Yield Tapes; President Promises to Comply Fully*, WASH. POST, July 25, 1974, at A01, available at http://www.washingtonpost.com/politics/court-orders-nixon-to-yield-tapes-president-promises-to-comply-fully/2012/06/04/gJQAZSw0IV_story.html.

¹⁹⁵ Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 100 (D.D.C. 2008). The D.C. Circuit never ruled on the district court's holding but instead vacated the decision after the White House and the House of Representatives worked out an agreement regarding Miers and Bolten. 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam). For further accountings of this dispute, see Chafetz, *supra* note 77, at 1087–93; GARVEY & DOLAN, *supra* note 168, at 40–45.

¹⁹⁶ See Gerstein, *supra* note 7; Gerstein, *supra* note 8. For additional discussion, see GARVEY & DOLAN, *supra* note 168, at 45–49.

velopment creates a second constitutional problem with defense of federal statutes. Defense by the House or Senate counsel violates not only the norm separating lawmaking from implementation but also the structural requirement of bicameralism. On the other hand, since each chamber maintains independent control of its internal proceedings, the bicameralism norm does not cut against House or Senate enforcement of committee subpoenas.

A. The Structural and Institutional Division Between the House and the Senate

The Constitution does not establish a single unified “Congress.” Instead, Article I provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which *shall consist* of a Senate and House of Representatives.”¹⁹⁷ Each chamber represents a different geographic and temporal constituency. The House is elected every two years on the basis of population¹⁹⁸ and is thereby designed to be more responsive to the will of the electoral majority.¹⁹⁹ The Senate, by contrast, provides an equal vote to each state and thus gives greater weight to individual state concerns.²⁰⁰ Moreover, because members of the Senate serve a six-year term,²⁰¹ that body is deliberative, more experienced, and “less likely to be captured by the trends of the day than the House.”²⁰²

The division between these two legislative chambers is a crucial component of our constitutional scheme of separated powers. James Madison argued that in order to prevent legislative encroachments on constitutional principles, the legislature should be split into two chambers that would be “as little connected with each other” as possible.²⁰³ Then, once separated into two co-equal chambers, the House and the

¹⁹⁷ U.S. CONST. art. I, § 1 (emphasis added).

¹⁹⁸ See *id.* art. I, § 2, cl. 1, 3 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States Representatives . . . shall be apportioned among the several States . . .”).

¹⁹⁹ See, e.g., THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961) (“[I]t is particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this . . . can be effectually secured.”).

²⁰⁰ See U.S. CONST. art I, § 3, cl. 1; *id.* amend. XVII.

²⁰¹ See *id.* art. I, § 3, cl. 1; *id.* amend. XVII.

²⁰² Sean M. Theriault & David W. Rohde, *The Gingrich Senators and Party Polarization in the U.S. Senate*, 73 J. POL. 1011, 1011 (2011).

²⁰³ THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (“In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches . . .”). Political scientists have noted that the differences between the House and the Senate enable them to provide an effective “check” on one another. See BUCHANAN & TULLOCK, *supra* note 40, at 235–36.

Senate could serve as important “checks” on one another.²⁰⁴ If a dangerous faction gained control over the House of Representatives, the Senate would serve as “a defense to the people against their own temporary errors and delusions.”²⁰⁵ Conversely, in the event that the Senate was transformed “into an independent and aristocratic body, . . . the House of Representatives, with the people on their side, [would] at all times be able to bring back the Constitution to its primitive form and principles.”²⁰⁶

As political scientists have documented, although the House of Representatives and Senate have evolved over time,²⁰⁷ this tension between the two chambers endures.²⁰⁸ The House and the Senate differ sharply from one another—not only in their constituencies and modes of election but also in their traditions and procedures.²⁰⁹ Each chamber has used its power over the “Rules of its Proceedings” to craft procedures that largely embody the Madisonian vision of a more responsive House and a more restrained Senate.

The rules of the House of Representatives facilitate majoritarian control. As political scientist Barbara Sinclair recounts, since the 1970s and 1980s, the leaders of the majority party (the Speaker, majority leader, and majority whip) have exercised immense control over the movement of legislation through the chamber.²¹⁰ The majority

²⁰⁴ THE FEDERALIST NO. 62, at 378–79 (James Madison) (Clinton Rossiter ed., 1961) (“It doubles the security to the people by requiring the concurrence of two distinct bodies . . . where the ambition or corruption of one would otherwise be sufficient.”); see also WOOD, *supra* note 42, at 559 (noting that during the ratification debates, “[b]icameralism was . . . increasingly defended as simply another means of restraining and separating political power”).

²⁰⁵ THE FEDERALIST NO. 63, at 384 (James Madison) (Clinton Rossiter ed., 1961).

²⁰⁶ *Id.* at 389–90; see also WOOD, *supra* note 42, at 554, 660 (noting that some delegates, including Alexander Hamilton, wanted an aristocratic Senate, but during Ratification, they defended bicameralism as a means of preventing the concentration of power).

²⁰⁷ For example, since the adoption of the Seventeenth Amendment in 1913, Senators have been directly elected by the people rather than selected by state legislatures. See U.S. CONST. amend. XVII, cl. 1.

²⁰⁸ See ROSS K. BAKER, HOUSE AND SENATE 9 (4th ed. 2008) (“[A]lthough the lawmaking power vested by the Constitution in both houses is more or less the same, there are important differences, and these differences create two quite distinct institutional personalities.”); Steven S. Smith, *Parties and Leadership in the Senate*, in THE LEGISLATIVE BRANCH 255, 276 (Paul J. Quirk & Sarah A. Binder eds., 2005) (“The contrast between the modern Senate and the modern House of Representatives is stark, even considering that both houses are deeply affected by new-styled election campaigns, polarized parties, and intense partisanship.”).

²⁰⁹ The Senate, for example, is considered the chamber of greater prestige. WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 25 (7th ed. 2007).

²¹⁰ See BARBARA SINCLAIR, LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA 44 (1995) (discussing the power of the House majority party leadership); Lawrence C. Dodd & Bruce I. Oppenheimer, *The Politics of the Contemporary House: From Gingrich to Pelosi*, in CONGRESS RECONSIDERED 23, 27, 45 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009) (discussing the control exercised by Speakers Newt Gingrich and Nancy Pelosi). For a discussion of how party polarization has

leaders select the members of major committees, impose rules limiting floor debate, and largely prohibit members of the minority party from offering amendments.²¹¹ Majority leaders can typically ensure that the party's key programs make it through the House with little interference from the opposition.²¹² Indeed, as political scientist Steven Smith puts it, "[t]he ability of the majority to impose rules and gain votes [in the House] allows it to run roughshod over minority rights."²¹³

By contrast, the Senate has adopted procedures and norms that promote individualism and facilitate minority participation.²¹⁴ Several procedures, including the filibuster,²¹⁵ the power to offer nongermane amendments,²¹⁶ and the informal practice of placing "holds" on legislation,²¹⁷ ensure that any Senator can block debate on a measure, at least temporarily. Because of these procedural tools, debate in the Senate often takes place only by unanimous consent.²¹⁸ Although some scholars doubt whether these procedures render the Senate "the greatest deliberative body in the world,"²¹⁹ there is no question that

contributed to a concentration of power in majority party leadership, see Devins, *supra* note 149, at 755–59.

²¹¹ See Barbara Sinclair, *Parties and Leadership in the House*, in *THE LEGISLATIVE BRANCH* 224, 237 (Paul J. Quirk & Sarah A. Binder eds., 2005) ("On major legislation of importance to the party, the House majority-party leadership oversees the legislative process from the beginning.").

²¹² See *id.* at 251 ("The current process . . . tends to exclude the minority party and the interests and segments of society it represents.").

²¹³ Smith, *supra* note 208, at 276.

²¹⁴ See Barbara Sinclair, *The New World of U.S. Senators*, in *CONGRESS RECONSIDERED* 1, 4–5 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 10th ed. 2013) (arguing that the major features of the modern Senate are individualism and intense partisanship).

²¹⁵ See Smith, *supra* note 208, at 255 ("The filibuster, or threatened filibuster, . . . provides the ultimate protection for . . . individual and minority rights."). Under Rule 22, a cloture motion to end debate requires three-fifths of the Senate (sixty votes). C. Lawrence Evans, *Politics of Congressional Reform*, in *THE LEGISLATIVE BRANCH* 490, 510 (Paul J. Quirk & Sarah A. Binder eds., 2005).

²¹⁶ See Sinclair, *supra* note 214, at 8–9 (stating that Senators may use "nongermane amendments to pursue their personal agendas and to bring to the floor issues that the leadership might like to avoid").

²¹⁷ See Smith, *supra* note 208, at 268–69 (observing that a "hold" is essentially "a threat to block" legislation if the majority leader brings it to the floor).

²¹⁸ See SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* 54 (2008) (noting that legislation is often passed under unanimous consent agreements); Smith, *supra* note 208, at 267–68 ("[T]he need to acquire unanimous consent . . . gives senators a source of leverage over each other.").

²¹⁹ Compare DONALD R. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 5 (1960) (stating that the Senate "calls itself the greatest deliberative body in the world"), and WILLIAM S. WHITE, *CITADEL: THE STORY OF THE U.S. SENATE* 5, 19 (1957) (describing the Senate as "the world's greatest forum of debate"), with Smith, *supra* note 208, at 274–75 ("In practice, little meaningful deliberation occurs on the Senate floor.").

individual Senators have considerable power to obstruct action within the chamber.²²⁰

These distinct institutional cultures have created a bit of a rivalry between the two chambers. The sentiment in the House is nicely captured by the statement (sometimes attributed to former Speaker Sam Rayburn) that the other party is “the opposition. The Senate is the enemy.”²²¹ The Senate, in turn, “pride[s] itself on not being the House.”²²²

The tension and competition between the two legislative chambers is crucial to the constitutional scheme. The Constitution generally seeks to ensure that neither house of Congress takes any action without conferring with the other chamber (or with the President); thus, Article I confers no independent “legislative power” on either the House or the Senate but requires them to work together and with the President to enact laws.²²³ Likewise, the House and the Senate play separate and independent roles in the impeachment process, with the House empowered to indict an alleged offender²²⁴ and the Senate overseeing the trial of the accused.²²⁵ No official can be removed from office without the concurrence of both chambers of Congress.²²⁶ Moreover, even when the Senate acts independently of the House (as in the context of treaties and appointments), it is only to serve as a check on the President.²²⁷

The Constitution permits each chamber to take unilateral action in only one context: with respect to its internal procedures. As discussed, this is also the only area in which the Constitution blends “rulemaking” and “implementation.” Article I empowers each chamber to craft and enforce “the Rules of its Proceedings,”²²⁸ without interference from its institutional “enemy.” Notably, this authority is

²²⁰ That does not, of course, mean that Senators do in fact block action that they oppose. On the contrary, a Senator will often cooperate with her colleagues, with the expectation that her colleagues will return the favor later on. See Sinclair, *supra* note 214, at 21 (“[A]lmost all senators want to ‘get something done’ and are aware that many senators’ exploiting their prerogatives to the limit would make that impossible.”).

²²¹ OLESZEK, *supra* note 209, at 28 (noting the “interchamber jealousies and rivalries, evident even when the same party controls both chambers”); see also Perry Bacon Jr., *Senate’s Deliberate Pace Frustrates the House*, WASH. POST, Mar. 23, 2010, at A17 (attributing the “enemy” statement to Democratic House Speaker Sam Rayburn).

²²² THERIAULT, *supra* note 218, at 201–02 (“The Senate has prided itself on not being the House. Collegiality, deference, and civility have long characterized the Senate . . .”).

²²³ See U.S. CONST. art. I, § 7, cl. 2.

²²⁴ See *id.* art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”).

²²⁵ See *id.* art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

²²⁶ *Id.*; *id.* art. II, § 2, cl. 5.

²²⁷ See *id.* art. II, § 2, cl. 2.

²²⁸ *Id.* art. I, § 5, cl. 2.

itself an important component of the constitutional scheme because it has enabled the House and the Senate to devise rules that promote the institutional competition and tension that Madison envisioned.²²⁹ Furthermore, this constitutional provision is the textual source of each chamber's investigative authority—a power that has enabled each house to conduct inquiries into executive wrongdoing.²³⁰ The House and the Senate act separately and independently when conducting such investigations—each pursuing matters of interest to its chamber.²³¹ But outside this context, the House and the Senate can take action only through the complex mechanisms of bargaining and compromise mandated by our bicameral scheme.

B. The Development of the House and Senate Counsel

The House and Senate counsel offices developed during the 1970s in ways that largely reflect the distinct institutional cultures of the two chambers. This development nicely illustrates why the House and Senate counsel are well suited to represent their respective institutions in matters that are confided to them by the Constitution, such as contempt and subpoena proceedings and other litigation arising out of House or Senate investigations. At the same time, however, this account underscores the impropriety of either the House or the Senate counsel purporting to speak on behalf of the Congress as a whole, much less the United States, in defense of federal law.

1. *The House Counsel as the Majority Party Counsel*

The counsel for the House of Representatives developed in an incremental manner beginning in the 1970s.²³² As with other reforms of that era, the counsel was the brainchild of the House majority leadership—then Democratic House Speaker Thomas P. (Tip) O'Neill.²³³ Accordingly, as political scientist Rebecca Salokar observes, from the outset, “[t]hat the office would be responsible to the Speaker of the House, the leader of the majority party, was not contested.”²³⁴

²²⁹ See THE FEDERALIST NO. 63, at 387–90 (James Madison) (Clinton Rossiter ed., 1961) (explaining why a divided Congress is a solution to the potential tyranny and corruption of the legislative branch).

²³⁰ See *supra* Part I.E.

²³¹ See *id.*

²³² See Salokar, *supra* note 80, at 132 (noting how “during the mid-1970s under the direction of Speaker Thomas P. O’Neill,” the House counsel became “the chief legal office for the House of Representatives”).

²³³ See *id.* at 132, 148 (describing Speaker O’Neill’s efforts to expand the counsel’s role).

²³⁴ See *id.* at 148.

In 1976, Speaker O'Neill called upon Stanley Brand, a close associate, to develop a counsel's office.²³⁵ Over time, Brand and his successors became involved in a variety of legal matters—drafting subpoenas in connection with House investigations,²³⁶ providing informal advice to House members,²³⁷ and litigating cases arising out of House activities.²³⁸ Thus, as Brand stated, with the support of Speaker O'Neill the office became, “in effect, . . . the attorney general of the House.”²³⁹

In 1993, the House counsel's position was formally recognized in a House rule.²⁴⁰ In keeping with preexisting practice, the rule provides that the House General Counsel “shall function pursuant to the direction of the Speaker” in providing legal assistance to the House.²⁴¹ And although the rule states that the House counsel should act “without regard to political affiliation,” and that the Speaker “shall consult” with both the majority and the minority party leaders (the

²³⁵ See *id.* at 137 (noting the “close working relationship” between Brand and O'Neill); see also OFFICE OF GENERAL COUNSEL, U.S. HOUSE OF REPRESENTATIVES: PRIOR GENERAL COUNSELS, <http://www.ogc.house.gov/about/prior-general-counsels.shtml> (last visited Jan. 27, 2014) (showing that Stanley Brand served from 1976 to 1983).

²³⁶ See Michael L. Stern, *Ethical Obligations of Congressional Lawyers*, 63 N.Y.U. ANN. SURV. AM. L. 191, 198 (2007). Such matters do not typically result in litigation. When they do, the litigation is sometimes handled by counsel hired by the House or Senate committee seeking the subpoena. See Interview with Charles Tiefer (July 25, 2012) (on file with authors).

²³⁷ See Salokar, *supra* note 80, at 143 (“A large portion of the workload . . . is devoted to advising individual members on issues ranging from constituent service problems to committee actions.”).

²³⁸ Only a small part of the House counsel's litigation activities involve constitutional questions. See Interview with Charles Tiefer (July 25, 2012) (on file with authors) (estimating that such cases make up around twenty percent of the counsel's activities). Other cases may involve subpoenas from outside parties or personnel and employment matters. See Rebecca Mae Salokar, *Representing Congress: Protecting Institutional and Individual Members' Rights in Court*, in CONGRESS AND THE POLITICS OF EMERGING RIGHTS 105, 124 (Colton C. Campbell & John F. Stack, Jr. eds., 2002). Cases may also involve internal disputes among House members. See Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROBS. 47, 58–59 (1998) (discussing some disputes over House rules).

²³⁹ Salokar, *supra* note 80, at 137 (quoting a 1992 interview with Stanley M. Brand (internal quotation marks omitted)).

²⁴⁰ *Rule II.8*, in RULES OF THE HOUSE OF REPRESENTATIVES 3, 3 (Karen L. Haas ed., 2013) [hereinafter *House Rule II.8*] (“There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships.”); see 139 CONG. REC. 49, 134 (1993). In 1999, Congress enacted a statute expressly authorizing the House counsel to “enter an appearance” in any federal or state court. 2 U.S.C. § 130f(a), (d) (2012). This statute does not, however, otherwise define the counsel's duties but simply recognizes the office “established and operating under clause 8 of rule II of the Rules of the House of Representatives.” *Id.* § 130f(c)(1).

²⁴¹ *House Rule II.8*, *supra* note 240, at 3.

so-called Bipartisan Legal Advisory Group),²⁴² the counsel's role has largely been defined by the Speaker and other majority leaders.²⁴³ The House counsel becomes involved in litigation only if it is of sufficient interest to the Speaker.²⁴⁴ And when a new party takes control of the House, the Speaker always selects a new counsel.²⁴⁵ Thus, the House counsel's office "has long been viewed as a partisan appointment,"²⁴⁶ one that is "inextricably linked . . . to party politics."²⁴⁷

That is not to say that most of the House counsel's actions have partisan overtones. On the contrary, many of the counsel's legal activities, such as providing informal advice to members and drafting routine subpoenas, are not likely to draw the attention of members, much less trigger a partisan fight.²⁴⁸ Furthermore, the House counsel has engaged in some litigation with bipartisan support.²⁴⁹ But in keeping with the current institutional norms of the House, the majority leadership has the power to control the counsel's actions, if it so chooses. For this reason, the House counsel can be described as the "majority counsel."²⁵⁰

²⁴² *Id.*

²⁴³ See Interview with Charles Tiefer (July 25, 2012) (on file with authors).

²⁴⁴ See *id.*; see also Stern, *supra* note 236, at 199–200 (stating that, although the Speaker does not oversee routine matters, "[i]n the event that a representation either involves sensitive matters or implicates institutional interests, the Speaker's office is notified or consulted").

²⁴⁵ See Salokar, *supra* note 80, at 138 ("By tradition, for example, the General Counsel tenders his resignation to an incoming Speaker of the House."). Eight individuals have served as counsel since the office was created in 1976. *Prior General Counsels*, OFF. GEN. COUNS., U.S. HOUSE REPRESENTATIVES, <http://www.ogc.house.gov/about/prior-general-counsels.shtml> (last visited Jan. 27, 2014).

²⁴⁶ Mary Jacoby, *Outgoing Senate Legal Counsel Asked to Stay as Deputy Counsel After 16 Years in Top Job*, ROLL CALL, Mar. 16, 1995.

²⁴⁷ Salokar, *supra* note 80, at 148; see also Interview by Senate Historical Office Oral History Project with Charles E. Ludlam, Staff of Sens. James Abourezk and Joseph Lieberman 24 (Dec. 2, 2003), available at http://www.senate.gov/artandhistory/history/oral_history/Ludlam_chuck.htm (stating that from the outset the House counsel "was entirely managed by the Speaker, then by O'Neill. There was no bipartisanship about it").

²⁴⁸ Indeed, in practice even the Speaker does not carefully oversee the House counsel's routine activities. See Stern, *supra* note 236, at 199 ("[T]he OHC provides routine representation . . . without any involvement of the Speaker's office.").

²⁴⁹ That was true in *INS v. Chadha*, 462 U.S. 919 (1983). See Tiefer, *supra* note 238, at 52 (noting the bipartisan support for the House counsel's defense of the legislative veto).

²⁵⁰ That was how Representative Robert Kastenmeier (perhaps unwittingly) described the House counsel during a debate over the counsel's involvement in litigation over the Flag Protection Act. See 136 CONG. REC. 5002 (1990) (statement of Rep. Robert Kastenmeier, D-Wis.) (discussing "the majority counsel, the counsel for the House"). Representative Newt Gingrich seized upon the comment, stating that "in a Freudian slip" Kastenmeier had captured "precisely [the minority's] concern" about the House counsel. *Id.* (statement of Rep. Newt Gingrich, R-Ga.).

2. From “Congressional Counsel” to Separate Senate Counsel

The Senate Office of Legal Counsel developed in a manner that reflects that institution’s greater focus on bipartisan consensus and individualism. Notably, the initial proponents of the office sought to create a “legislative attorney general” or “congressional counsel” that would serve both the House and the Senate.²⁵¹ In the late 1970s, in the wake of the Watergate scandal, a proposal for a “congressional counsel” was incorporated into a series of bills designed to improve government ethics, including one that would create an independent counsel.²⁵² The “congressional counsel” reform was viewed as “another important initiative—in the spirit of the Budget Reform Act and war powers resolution—to restore to the Congress’ [sic] its separate powers which have been seriously eroded in post war decades.”²⁵³

Senator James Abourezk, one of the principal proponents of a nonpartisan “congressional counsel,”²⁵⁴ argued that only a “joint counsel” could properly represent Congress’s institutional interests.²⁵⁵ He asserted that “separate House and Senate offices will cancel out much of the advantage of having in-house litigation counsel.”²⁵⁶ Senator Abourezk noted that “[e]ven with only two legal offices in the Congress, most of the advantages of consistency, anticipation and coordination will be lost to Congress as an institution.”²⁵⁷ He insisted: “Neither House acting alone can assert the prerogative of representing the Congress.”²⁵⁸

²⁵¹ See, e.g., S. REP. NO. 95-170, at 37–41 (1977) (discussing a proposed “Office of Congressional Legal Counsel” in a bill that would also create a special prosecutor); 113 CONG. REC. 5277–78 (Mar. 2, 1967) (statement of Sen. Vance Hartke, D-Ind.) (proposing a “Legislative Attorney General”).

²⁵² See 122 CONG. REC. 22,788 (1976) (statement of Sen. Jacob Javits, R-N.Y.) (noting an “Office of General Counsel” in the Watergate Reform Act of 1976). Although there were a few proposals for a legislative counsel in the late 1960s, the effort did not gain momentum until after the Watergate scandal. See S. REP. NO. 95-170, at 18–20 (1977) (chronicling the “Congressional concern with the need to establish an Office of Congressional Legal Counsel”).

²⁵³ 122 CONG. REC. 22,674 (1976) (statement of Sen. Jacob Javits, R-N.Y.); see also Salokar, *supra* note 238, at 108 (noting that the firing of Archibald Cox “supported the development of an in-house legal advisor for Congress”).

²⁵⁴ See S. REP. NO. 95-170, at 20 (1977) (observing that Senator Abourezk had initiated some of the early proposals for a congressional counsel).

²⁵⁵ See *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings on S. 555 Before the Comm. on Governmental Affairs*, 95th Cong. 60–61 (1977) (statement of Sen. James Abourezk, D-S.D.) [hereinafter *Public Officials Integrity Act: Hearing*] (“Only by establishing a joint House-Senate office will the Congress be able to effectively and consistently to [sic] defend its constitutional powers in court.”).

²⁵⁶ *Id.* at 60.

²⁵⁷ *Id.* at 61.

²⁵⁸ *Id.* at 61; see also S. REP. NO. 95-170, at 12 (1977) (asserting that “the integrity and independence of Congress as a coequal branch of government requires that Congress defend itself through its own counsel”).

The House of Representatives, however, refused to accept a joint counsel—apparently because of its longstanding institutional rivalry with the Senate.²⁵⁹ In large part, the House feared that a joint office would not reflect House preferences on matters that divided the two chambers.²⁶⁰ In particular, the House reflects majority party preferences, and a nonpartisan office might not give voice to those preferences.²⁶¹ As House counsel Stanley Brand explained, “The House has had bad experiences with joint offices . . . [which] tend to be dominated and taken over by the Senate and the House . . . given second fiddle.”²⁶² Likewise, Steven Ross, who served as House counsel after Brand, stated that the House’s refusal to accept a “joint office” was based on an “inter-house rivalry and the House’s not wanting to have its business connected with the Senate.”²⁶³

After the House refused to vote on a proposal to create a joint legislative counsel, the Senate decided to retain the language of nonpartisanship, retrofitting the joint counsel proposal into a statutorily based “Office of Senate Legal Counsel.”²⁶⁴ Consistent with the Senate’s institutional norms, the statute creating the Senate counsel specifically designates the position as nonpartisan.²⁶⁵ Unlike the House counsel (who serves at the pleasure of the Speaker),²⁶⁶ the Senate counsel and deputy counsel serve for a term of four years, are appointed by the President pro tempore of the Senate in consultation with majority and minority leadership, and are approved by a Senate resolution.²⁶⁷ The Senate counsel reports to a Senate Leadership Group, which consists of seven members (four from the majority party

²⁵⁹ See Salokar, *supra* note 80, at 136 (reporting that the House’s decision was based in large part on an interhouse rivalry).

²⁶⁰ What mattered most to the House, according to former House counsel Steven Ross, was preserving the “independent status” of the House, especially when the Senate office has taken “a different approach.” Salokar, *supra* note 80, at 147–48 (quoting Ross).

²⁶¹ See *supra* notes 210–13 and accompanying text (discussing majority leader control in the House); see also *supra* notes 241–47 (discussing majority party control of House General Counsel and House Bipartisan Legal Advisory Group).

²⁶² Salokar, *supra* note 80, at 136 (quoting from an interview with Stanley Brand (internal quotation marks omitted)); see also *Public Officials Integrity Act: Hearing, supra* note 255, at 60 (statement of Sen. James Abourezk, D-S.D.) (indicating that during the legislative debates over the joint counsel, the House had expressed “some reservations about establishing a joint office on the fear that the Senate might dominate the office” but arguing that “[t]his fear is utterly without foundation”).

²⁶³ Salokar, *supra* note 80, at 136 (quoting from an interview with Steven Ross).

²⁶⁴ See Act of Oct. 26, 1978, Pub. L. No. 95-521, §§ 701–717, 92 Stat. 1824, 1875–85.

²⁶⁵ 2 U.S.C. § 288(a)(2) (2012) (specifying that the appointment of the Senate counsel is to be made “without regard to political affiliation”).

²⁶⁶ Under House Rule II.8, the Office of House General Counsel “shall function pursuant to the direction of the Speaker,” who need only “consult” with the majority and minority leadership. *House Rule II.8, supra* note 240, at 3; see also *supra* notes 199–203 and accompanying text (discussing the rationale underlying structural divisions between the House and the Senate).

²⁶⁷ 2 U.S.C. § 288(a)(2)–(3)(A) (2012).

and three from the minority).²⁶⁸ The counsel cannot take any action absent the consent of at least two-thirds of the Leadership Group—a requirement that ensures a minority party “veto.”²⁶⁹ Furthermore, many actions, including participation in any legal proceeding (as *amicus* or *intervenor*), require a resolution of the full Senate.²⁷⁰ Such a resolution could, of course, be filibustered by a single Senator. Accordingly, the majority and minority leaders (who head the Leadership Group) do not propose Senate counsel action unless they are confident that there is broad and bipartisan support within the chamber.²⁷¹

Perhaps for these reasons, the Senate counsel has gained a reputation for bipartisanship.²⁷² In fact, unlike her House counterpart, the Senate counsel rarely steps down simply because there is a change in party control of the chamber.²⁷³ Only four individuals have served as Senate Legal Counsel since that office was established in 1978.²⁷⁴

²⁶⁸ See *id.* § 288a(a) (“The Office shall be directly accountable to the Joint Leadership Group”); *id.* § 288a(b) (providing that the Joint Leadership Group “shall consist of” the President pro tempore, the majority and minority leaders, the Chairman and ranking minority member of the Senate Judiciary Committee, and the Chairman and ranking minority member of the committee of the Senate with control over the Senate’s contingent fund).

²⁶⁹ See *id.* § 288b(a) (stating that the “Counsel shall defend the Senate or a committee, subcommittee, Member, officer, or employee of the Senate” in suits challenging actions taken in their official capacity “only when directed to do so by two-thirds of the Members of the Joint Leadership Group or by the adoption of a resolution by the Senate”); see also S. REP. NO. 95-170, at 86 (1977) (stating that the “two-thirds vote requirement . . . serves to protect the interests of the minority party”).

²⁷⁰ See 2 U.S.C. §§ 288b(b), (c), 288e(a) (providing that the Senate counsel may not enforce a subpoena issued by a committee or subcommittee, or intervene or appear as *amicus* in court on behalf of the Senate or one of its members or components, absent a resolution of the Senate). The statute provides that the Senate counsel may intervene as of right to defend a federal law. See *id.* § 288l. But it does not purport to find that the Senate counsel has standing to do so. See *id.* § 288e(a) (“The Counsel shall be authorized to intervene only if standing to intervene exists under section 2 of article III of the Constitution of the United States.”). Interestingly, in contrast to the DOJ, the Senate counsel may intervene only to *defend* the constitutionality of federal laws. *Id.* § 288h (providing that “[i]n performing any function . . . , the Counsel shall *defend vigorously*” the “constitutional power[s] of the Senate” and “the constitutionality of Acts and joint resolutions of the Congress” (emphasis added)).

²⁷¹ Interview with Charles Tiefer (July 25, 2012) (on file with authors).

²⁷² See Salokar, *supra* note 80, at 150 (observing that the Senate counsel has a “more clearly established role . . . as a nonpartisan actor”); Tiefer, *supra* note 238, at 48–49 & nn.5–6 (noting how the Senate counsel early on gained a reputation for nonpartisanship).

²⁷³ Interview with Charles Tiefer (July 25, 2012) (on file with authors).

²⁷⁴ From its inception and until 1995, Mike Davidson served as counsel under both Republican and Democratic Senates. See Tiefer, *supra* note 238, at 48 & n.5. Starting in 1999, Morgan Frankel and Patricia Bryan have traded places as Senate counsel and deputy counsel (with Frankel serving as counsel when Democrats controlled the Senate and Bryan serving as counsel when Republicans were in control). See S. Res. 16 & 17, 110th Cong. (2007) (enacted) (noting that Frankel and Bryan were switching positions after 2006 Democratic takeover of the Senate).

The Senate counsel engages in many of the same functions as her House counterpart—providing informal advice, assisting with investigations, representing members who are subpoenaed by outside parties, and litigating cases on behalf of the Senate or one of its components.²⁷⁵ Nevertheless, despite their similar functions, the House and Senate counsel rarely work together.²⁷⁶ They rarely file joint briefs—even when they are on the same side of a case.²⁷⁷ As former House counsel Ross explains, the “two offices and the two branches [of Congress] are jealous of their independent status.”²⁷⁸ The two counsels therefore maintain separate offices, serving as the “attorney general of the House” and the Senate, respectively.²⁷⁹

C. House-Senate Differences and the Workings of the House and Senate Legal Counsel

The House and the Senate are “naturally unlike” and the House and Senate counsel reflect the basic differences between the two chambers.²⁸⁰ The House is more partisan and more likely to find executive branch officials in contempt of Congress during periods of

²⁷⁵ See 2 U.S.C. §§ 288b, 288c, 288d, 288e (2012) (authorizing the Senate counsel to “bring a civil action to enforce a subpoena” and to “intervene or appear as *amicus curiae*” on behalf of the Senate or one of its officers or committees); Salokar, *supra* note 80, at 139 (“The functions and roles of the congressional counsel offices are similar: their work includes subpoena proceedings, contempt and immunity orders, advisement to members and staff, and finally, litigation activity.”). Both counsels have also advised their respective chambers on their (distinct) roles in the impeachment process. See Salokar, *supra* note 238, at 121.

²⁷⁶ Indeed, the degree to which the two offices communicate with one another is even unclear. In our interviews with former lawyers in the House and Senate counsel offices, we heard different accounts of the level of communication between the offices. Compare Interview with Charles Tiefer (July 25, 2012) (on file with authors) (stating that there is very little communication between the offices and that if the House and Senate counsel “happen to be on the same side” of a case, there might at most be “some chat” between the two offices), with Interview with Morgan Frankel (Aug. 15, 2012) (on file with authors) (stating that there is “frequent” communication between the offices).

²⁷⁷ See Interview with Charles Tiefer (July 25, 2012) (on file with authors) (explaining that, even when the House and the Senate are on the same side, they rarely file joint briefs); Interview with Morgan Frankel (Aug. 15, 2012) (on file with authors) (stating that the offices occasionally, but rarely, file joint briefs); see also Salokar, *supra* note 80, at 141 (noting that the lack of joint filings could be attributed to institutional differences between the House and the Senate). One rare case involving a joint filing—albeit only as *amicus*—was a suit challenging the Line-Item Veto Act. See *Raines v. Byrd*, 521 U.S. 811, 818 n.2, 820–21 (1997) (noting that the “House Bipartisan Legal Advisory Group . . . and the Senate filed a joint brief as *amici curiae*” urging that the law be upheld). Interestingly, the two chambers did not file a joint brief in the second case involving the Line-Item Veto Act. See *Clinton v. City of New York*, 524 U.S. 417, 420 (1998) (showing no brief filed by the House counsel, and only an *amicus* brief filed by the Senate counsel).

²⁷⁸ Salokar, *supra* note 80, at 147 (quoting an interview with Steven Ross).

²⁷⁹ See *supra* note 239 and accompanying text.

²⁸⁰ OLESZEK, *supra* note 209, at 23 (quoting Woodrow Wilson (internal quotation marks omitted)). For additional discussion of House-Senate differences, see *supra* Part II.A–B.

divided government.²⁸¹ Supermajority requirements and norms of nonpartisanship in the Senate, on the other hand, cut against partisan investigations and related litigation.²⁸² And while party polarization has transformed the Senate into a more partisan body,²⁸³ “[i]mportant distinctions persist and they are distinctions that define dramatically the differences between the two houses.”²⁸⁴ In other words, inherent House-Senate differences make it impossible for either chamber to speak the voice of the entire Congress. On the other hand, the House and Senate counsel are well positioned to advance the institutional interests of their own chamber on matters involving internal proceedings. For example, the House counsel was a vigorous advocate for House prerogatives in litigation involving contempt of Congress charges against the George W. Bush and Obama administrations.²⁸⁵

Before 1981 (when the House and Senate formally intervened in *INS v. Chadha*),²⁸⁶ the House and the Senate participated as parties in litigation over internal proceedings but not the defense of federal statutes.²⁸⁷ Moreover, on congressional investigations and other matters involving internal proceedings, the House has been populist and partisan, often acting in response to public discontent. In 1827, for example, the House voted to formally recognize its contempt power for the first time; the 102 to 88 party-line vote reflected the majoritarian nature of House investigations.²⁸⁸ More telling, in the period since World War II, House investigations of the executive occur more often in periods of divided government.²⁸⁹ For its part, Senate investigations of the executive reflect bipartisan norms and supermajority requirements. They are marginally more likely to occur in periods of

²⁸¹ See *infra* notes 288–89.

²⁸² See *infra* notes 290–92.

²⁸³ See Theriault & Rohde, *supra* note 202, at 1011–12.

²⁸⁴ BAKER, *supra* note 208, at 197; see also Ross K. Baker, *A Half-Century of Bicameralism*, in *THE U.S. SENATE: FROM DELIBERATION TO DYSFUNCTION* 49, 62–64 (Burdett A. Loomis ed., 2012) (discussing both persistence and change in House-Senate relations).

²⁸⁵ See *supra* notes 190–96.

²⁸⁶ S. Res. 40 and H.R. Res. 49, 97th Cong. (1st Sess. 1981).

²⁸⁷ See *supra* Part I.E (noting House and Senate participation in litigation in conjunction with the enforcement of congressional subpoenas).

²⁸⁸ Before 1827, the House recognized that it had inherent contempt authority; in 1827, the House voted to broaden this investigatory authority and thereby make the contempt power procedurally official. See M. Nelson McGeary, *Congressional Investigations: Historical Development*, 18 U. CHI. L. REV. 425, 425–27 (1950); see also *supra* note 167 and accompanying text (discussing the House’s assertion of inherent contempt power in 1795). Supermajority requirements in the Senate almost certainly would have doomed a similar Senate inquiry.

²⁸⁹ DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS: 1946–2002*, at 30–32 (2d ed. 2005) (noting how, between 1946 and 1990, the House conducted eight out of eleven of its investigations when the opposing party held the presidency).

unified, not divided, government;²⁹⁰ the minority party is likely to play a critical role in such inquiries.²⁹¹ The Teapot Dome investigations of the 1920s and Watergate both exemplify the bipartisan nature of Senate inquiries.²⁹²

Differences in House and Senate practices are enduring, fundamental, and reflective of the constitutional design. At the same time, party polarization has exacerbated the House-Senate divide. When the offices of the House and Senate counsel were first created, party divisions were less pronounced and, consequently, majority and minority lawmakers were more willing to embrace a unified view of Congress's institutional prerogatives.²⁹³ For this very reason, differences between the House and Senate counsel were somewhat muted in the 1980s.

Today's Congress, by contrast, is more polarized and differences between the chambers are more pronounced. In the House, the General Counsel speaks for just the majority; indeed, the minority party will often take issue with the counsel's legal positions by filing competing briefs.²⁹⁴ In the Senate, party polarization has resulted in a diminished role for the Senate counsel. In particular, as more and more issues divide the parties, the Office of Senate Legal Counsel is less and less likely to get both parties formally to sign on to Senate participation in legal disputes.²⁹⁵

²⁹⁰ See *id.* at 31 (noting that twenty-two Senate investigations between 1946 and 1990 lacked indicia of partiality).

²⁹¹ See Parker & Dull, *supra* note 189, at 328–31 (discussing how partisan minority members in the Senate have more rights than those in the House and finding marginally more Senate investigations during times of unified party control).

²⁹² See JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE 23–27 (1988) (providing a background of the Teapot Dome scandal and acknowledging that the related hearings were perceived as a partisan effort by Democrats to defeat Republican Calvin Coolidge in the next presidential election); CQ ALMANAC, *supra* note 188 (discussing the House investigations related to Watergate and the accusations of its partisan motivations); see also MATTHEW WARE COULTER, THE SENATE MUNITIONS INQUIRY OF THE 1930S: BEYOND THE MERCHANTS OF DEATH I, 25–33 (1997) (noting how Republican Senator Gerald Nye worked closely with Democrats in leading a two-year investigation of the munitions industry's influence on America's entry into World War I).

²⁹³ Most notably, the House and Senate counsel (reflecting consensus within Congress) were largely in sync when battling the Reagan administration's efforts to resurrect the "unitary executive." See Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 412, 422–23 (1989) (discussing how conflicts between the branches in the Reagan era were charged by partisan differences); *infra* notes 299–304 and accompanying text (discussing cases that united House and Senate counsel); see also DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT 47–50, 52–55, 60–65 (1992) (discussing congressional opposition to the Reagan administration's efforts to centralize power in the executive).

²⁹⁴ See Tiefer, *supra* note 238, at 57–59 (discussing the Senate minority's failure to act upon its opposition and the House minority's tendency to voice its opposition by bringing lawsuits or questioning the House General Counsel's positions).

²⁹⁵ See *supra* notes 288–94 and accompanying text; *infra* notes 304–05 and accompanying text.

Consider, for example, House and Senate counsel action when the Department of Justice refuses to defend federal statutes. In the less partisan 1980s, the House and Senate counsel both participated in litigation and did so in complementary, bipartisan ways. Most notably, in *INS v. Chadha* (legislative veto, 1983),²⁹⁶ *Bowsher v. Synar* (Gramm-Rudman, 1986),²⁹⁷ and *Morrison v. Olson* (special prosecutor, 1988),²⁹⁸ the House and Senate counsel filed briefs defending the constitutionality of Congress's handiwork.²⁹⁹ More than that, although the House and Senate counsel rarely work together,³⁰⁰ Senate counsel Mike Davidson did consult with House counsels Stanley Brand (*Chadha*) and Steven Ross (*Bowsher*, *Morrison*) when preparing these briefs.³⁰¹ Finally, these briefs were broadly bipartisan. No individual members filed competing briefs in either *Chadha* or *Morrison*. In *Bowsher*, a Republican joined eleven Democrats in filing a suit attacking the constitutionality of the statute.³⁰² Twelve more Democrats filed an amicus brief challenging the statute's constitutionality on different grounds, despite the adversarial presence of Democratic leadership among the intervening defendants.³⁰³ Further reflecting the bipartisan nature of Senate filings in *Chadha* and *Bowsher*, the President was a Republican and the Senate majority, too, was Republican.

Following the 1995 Republican takeover of Congress, however, the Senate counsel has not participated in a single case in which the DOJ refused to defend a federal statute.³⁰⁴ Instead, reflecting

²⁹⁶ See Tiefer, *supra* note 238, at 50–53.

²⁹⁷ See Brief of the Speaker and Bipartisan Leadership Group at 8–10, *Bowsher v. Synar*, 478 U.S. 714 (1986) (Nos. 85-1378, 85-1379); Brief of Appellant United States Senate at 9–11, *Bowsher v. Synar*, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, 85-1379).

²⁹⁸ See Brief of the Speaker and Leadership Group of the House of Representatives at 2–5, *Amici Curiae*, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279); Brief of the United States Senate as *Amicus Curiae* at 2–5, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 85-1379).

²⁹⁹ In addition to these filings, the House and Senate counsel also participated in a bipartisan way to defend (in the face of a DOJ refusal to defend) the constitutionality of the Competition in Contracting Act in the federal district court (1985) and federal court of appeals (1986). *Ameron, Inc. v. U.S. Army Corp of Eng'rs*, 809 F.2d 979, 981 (3d Cir. 1986), *aff'g* 607 F. Supp. 962 (D.N.J. 1985). Indeed, Republicans and Democrats in Congress joined together to pressure the Reagan administration to enforce the statutes at issue prior to this litigation. See Devins & Prakash, *supra* note 32, at 552–53 & n.229.

³⁰⁰ See *supra* notes 276–77 and accompanying text.

³⁰¹ See Interview with Mike Davidson (Oct. 11, 2012) (on file with authors).

³⁰² The two suits consolidated on appeal were originally filed by twelve congressmen. See Brief of Appellees Mike Synar, Member of Congress, et al. at 1, *Bowsher v. Synar*, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, 85-1379). For the additional Democrats filing as amici, see Brief *Amicus Curiae* of William H. Gray III et al., Members of Congress at 2, *Bowsher v. Synar*, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, 85-1379).

³⁰³ See Brief *Amicus Curiae* of William H. Gray III et al., Members of Congress at 3–4, *Bowsher v. Synar*, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, 85-1379).

³⁰⁴ See Memorandum from Jennifer Casazza, DOJ Decline Defense Congressional Participation, at *4 (copy on file with author) (noting that the Senate practice of not defend-

ever-increasing party polarization in Congress, the Senate counsel has been unable to speak with a bipartisan voice.³⁰⁵ In sharp contrast, the House counsel has defended the constitutionality of federal statutes *when* the president is from a different party than the House majority.³⁰⁶ Recent examples include *Miranda* override legislation (*Dickerson v. United States*) and DOMA (*United States v. Windsor*).³⁰⁷ In both cases, the House Bipartisan Legal Advisory Group, which directs the House counsel's actions, divided along partisan lines over whether to defend the federal statute.³⁰⁸ In both cases, the House minority filed a competing brief to make clear that the House BLAG was both wrong on the merits and spoke only for the majority party.³⁰⁹

The DOMA case is particularly instructive. That the Democratic Senate steered clear of the case is hardly surprising. It reflects the fact that Senate Democrats both disapprove of DOMA and, more generally, support the Obama administration. More than that, the Senate counsel speaks for a bipartisan Senate (so that there was never any

ing dates back to 1986). For additional discussion, see *infra* notes 342–48 and accompanying text.

³⁰⁵ The 1995 Republican takeover of Congress is an important marker of increased partisanship in Congress. Rule changes in the House and (to a lesser extent) the Senate shifted control away from committees and to party leaders. See Devins, *supra* note 149, at 756–59. Measures of party polarization show a substantial upswing in the ideological distance between the parties at this time. See *id.* at 750–51. More specifically, 1995 is the first year in which the Senate majority leader insisted that the Senate counsel have some affiliation with the majority party. See Jacoby, *supra* note 246; see also Daniel Klaidman, *Partisan Power Grab? Senate Counsel Shakeup*, LEGAL TIMES, Mar. 13, 1995, at 1 (noting how this appointment to a nonpartisan office reflects a move toward partisanship).

³⁰⁶ The BLAG has only authorized litigation in one non-defense case in which the House majority and president were of the same party: a low-salience separation-of-powers case that was free of partisan overtones. See Memorandum from Jennifer Casazza, *supra* note 304, at *6 (discussing the House counsel's defense of the Federal Advisory Committee Act in *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993)).

³⁰⁷ See Devins & Prakash, *supra* note 32, at 562 n.271, 563–71 (discussing DOJ refusals to defend in both cases and also indicating that the George W. Bush administration did not refuse to defend any congressional statutes).

³⁰⁸ In *Dickerson v. United States*, the “House Democratic Leadership” elected to file a brief adverse to the brief submitted by the Bipartisan Legal Advisory Group. See Brief *Amicus Curiae* of the House Democratic Leadership in Support of Petitioner at 2, *Dickerson v. United States*, 530 U.S. 428 (2000) (“The majority and minority leaderships may, or may not, reach agreement on a position to present. In cases where they do not, the leadership group consisting of the leadership of one party may file separately.”). In the DOMA context, House Democrats have complained that “the BLAG does not speak for all Members of the House of Representatives.” Jennifer Bendery, *Defense of Marriage Act: House Republicans Tie Federal Gay Marriage Ban to House Rules*, HUFFINGTON POST (Jan. 3, 2013, 10:30 AM), http://www.huffingtonpost.com/2013/01/02/defense-of-marriage-act_n_2399383.html.

³⁰⁹ See Brief *Amicus Curiae* of the House Democratic Leadership in Support of Petitioner at 1–3, *Dickerson v. United States* 530 U.S. 428 (2000); Brief of Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny H. Hoyer—As *Amici Curiae* in Support of Plaintiff-Appellee and Urging Affirmance at 1, *Windsor v. United States*, 699 F.3d 169 (No. 12-15388) (2d Cir. 2012).

consideration given to filing an amicus brief backing up DOJ claims that DOMA was unconstitutional).³¹⁰ House participation also reflects House norms. One hundred and thirty-two House Democrats complained that the House BLAG brief only reflected majority party views;³¹¹ the House BLAG, while acknowledging that it does not reflect minority party views, forthrightly claimed that it “functions on a majoritarian basis, like the institution it represents, when [bipartisan] consensus cannot be achieved.”³¹²

Differences between today’s House and Senate are also revealed in the willingness of the House, but not the Senate, to go to court to assert its institutional prerogatives against the executive. With House rules allowing a simple majority to invoke both the contempt power and the filing of lawsuits by the House counsel, the House is likely to be a vigorous proponent for congressional prerogatives when the opposition party controls the White House.³¹³ In both the 2012–2013 Fast and Furious case and the 2007 dispute over the firing of U.S. attorneys, the House majority sought judicial enforcement of subpoenas against high-ranking executive branch officials from the opposition party.³¹⁴ In the late 1990s, moreover, the House counsel defended House prerogatives in litigation disputes with minority party members over a House rule governing tax increases and a subpoena statute.³¹⁵

In the Senate, however, supermajority rules make it much harder for opposition party lawmakers to advance an expansive view of congressional power. The Office of Senate Legal Counsel cannot rise to the defense of a federal statute or otherwise participate in litigation without two-thirds support of a bipartisan leadership group (and, after

³¹⁰ Senate Legal Counsel Morgan Frankel never pursued the case, nor is there a hint that any Senator wanted the Office of Legal Counsel either to defend DOMA or to file an amicus brief arguing that DOMA was unconstitutional. Interview with Morgan Frankel (Aug. 15, 2012) (on file with authors).

³¹¹ See Brief of Members of the U.S. House of Representative—Including Objecting Members of the Bipartisan Legal Group, Representatives Nancy Pelosi and Steny H. Hoyer—As *Amici Curiae* in Support of Plaintiff-Appellee and Urging Affirmance at 1 n.1, *Golinski v. U.S. Office of Pers. Mgmt.*, 680 F.3d 1104 (9th Cir. 2012) (Nos. 12-15388, 12-15409).

³¹² *Petition for a Writ of Certiorari at 1 n.1, Bipartisan Legal Advisory Grp. of the U.S. House of Representatives v. Gill*, 133 S. Ct. 2884 (2013) (No. 12-13).

³¹³ See *supra* notes 188–96 and accompanying text (discussing opposition party efforts to embrace an expansive view of congressional power and, in so doing, discredit the George W. Bush and Obama administrations). But when the President’s party is in control of the chamber, the House is likely either to back the President or to step aside. See Shenon, *supra* note 189, at A18; cf. Michael R. Gordon & Jeff Zeleny, *Latest Plan Sets a Series of Goals for Iraq Leaders*, N.Y. TIMES, Jan. 8, 2007 at A1, A8 (noting the opposition of House Democrats to President Bush’s Iraq strategy); Reps. Issa & Upton, *supra* note 189 (expressing the intentions of House Republicans to investigate the Obama administration).

³¹⁴ See *supra* notes 190–93, 195–96 and accompanying text.

³¹⁵ These disputes are recounted in Tiefer, *supra* note 238, at 58–59.

that, a resolution of the full Senate is required).³¹⁶ In today's polarized Congress, there is little prospect of such bipartisan support. Consider, for example, the imbroglio over President Obama's 2012 recess appointments to the National Labor Relations Board (NLRB) and the Consumer Financial Protection Bureau.³¹⁷ On January 4, 2012, President Obama made four recess appointments during a pro forma session of the Senate, three to the NLRB and one to the Consumer Financial Protection Bureau.³¹⁸ Forty-five (out of forty-seven) Republican senators joined a legal challenge to the President's NLRB appointments. Before both the D.C. Circuit (where they submitted briefs and participated in oral arguments) and the Supreme Court (where they filed briefs and a petition for certiorari),³¹⁹ Senate Republicans argued that the "Constitution empowers the Senate, not the President," to determine whether it is in session and, correspondingly, that the executive's theory "would enable the President to sidestep the Senate at his pleasure, thus wielding the very unilateral appointment power that the Framers rejected."³²⁰ Senate Democrats,

³¹⁶ See *supra* notes 268–71 and accompanying text.

³¹⁷ Another example of this phenomenon was the Senate's pulling of a draft brief involving a recess appointment made by George H.W. Bush to the U.S. Postal Service's Board of Governors. The Senate's Democratic leadership sent a letter of protest to the White House and supported the filing of an amicus brief in a litigation dispute over the appointment. But the filing of the brief was blocked by Republican Senator Orrin Hatch, who opposed a resolution to authorize the filing of the brief. See 139 CONG. REC. 15,266–67 (July 1, 1993) (statement of Sen. George Mitchell, D-Me., including copy of draft Senate amicus brief); Mary Jacoby, *Hatch Move Prevents Democrats from Filing Brief on Lawsuit over Recess Appointments*, ROLL CALL, July 15, 1993. See generally Neal Devins, *Tempest in an Envelope: Reflections on the Bush White House's Failed Takeover of the U.S. Postal Service*, 41 UCLA L. REV. 1035, 1036–38, 1047–48 (1994) (discussing the legal background and implications of the Postal Service fight).

³¹⁸ See Laura Litvan, *Republicans May Block Nominees After Obama Recess Appointments*, BLOOMBERG BUSINESSWEEK (Jan. 31 2012), <http://www.businessweek.com/news/2012-01-31/republicans-may-block-nominees-after-obama-recess-appointments.html>. Pro forma sessions are intended to block the president from pocket-vetoing legislation or making recess appointments; they last only a few minutes, and no Senate business is conducted. See Memorandum Opinion from the Office of Legal Counsel to the Counsel to the President, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1, 22 (Jan. 6, 2012), available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf> (comparing the effect of a pro forma session on the recess appointment power and a pocket veto).

³¹⁹ See Brief of Senate Republican Leader Mitch McConnell and 44 Other Members of the United States Senate as *Amici Curiae* in Support of Certiorari, *NLRB v. Canning*, No. 12-1281; Brief for *Amici Curiae* Senate Republican Leader Mitch McConnell and 41 Other Members of the United States Senate in Support of Petitioner/Cross-Respondent Noel Canning, *Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (Nos. 12-1115, 12-1153), cert. granted, 133 S. Ct. 2861 (2013); Transcript of Oral Argument at 19–27, *Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (Nos. 12-1115, 12-1153), cert. granted, 133 S. Ct. 2861 (2013).

³²⁰ Brief for *Amici Curiae*, *supra* note 319, at 10–11. On the floor of the Senate and through mass mailings, Republican leaders also took aim at these appointments. Minority Leader Mitch McConnell, for example, challenged the President for undermining the Senate's confirmation power and thereby "fundamentally endanger[ing] the Congress's role

however, backed the President,³²¹ and the Senate never considered the possibility of Senate counsel participation in the dispute.³²²

No doubt, the House and Senate counsel speak for each chamber and not the entire Congress. House rules empower the majority party and, not surprisingly, the House counsel gives voice to majority party preferences. On issues implicating House proceedings, the House counsel is a true advocate of majority party preferences. When it comes to the defense of federal statutes, the House counsel advocates for the House majority; she does not speak the voice of the House minority and certainly does not speak the voice of the Senate. In particular, unlike the House, the Senate thought it should not speak in court unless its counsel could speak in a bipartisan way. On questions implicating Senate investigations and other proceedings, the Senate counsel had been able to speak in a bipartisan voice when Congress was not polarized and is less likely to do so today. At the same time, the Senate counsel has always been ill suited to speak Congress's institutional voice. Even if Senate Democrats and Republicans could come together in defense of a federal statute, the Senate's position might well deviate from the preferences of the House majority.

Twenty-five years have now passed since there has been a dispute with the executive branch uniting Democrats and Republicans in the House and the Senate.³²³ This simple fact highlights the relative unimportance of such litigation disputes to these offices, the reality that today's polarized Congress is not likely to come together to stand

in providing a check on the excesses of the executive branch." Press Release, U.S. Senate Republican Leader Mitch McConnell, Arrogantly Circumventing the American People with an Unprecedented 'Recess Appointment' of an Unaccountable Czar (Jan. 4, 2012), available at http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=cae9eff3-ab5c-411e-9a46-3e38b63a1bff&ContentType_id=c19bc7a5-2bb9-4a73-b2ab-3c1b5191a72b&Group_id=0fd6ddca-6a05-4b26-8710-a0b7b59a8f1f&MonthDisplay=1&YearDisplay=2012. On January 25, 2013, the D.C. Circuit backed up Republican complaints, ruling that the President could not make recess appointments during pro forma sessions of Congress. *Canning v. NLRB*, 705 F.3d 490, 506–07 (D.C. Cir. 2013) (Nos. 12-1115, 12-1153), cert. granted, 133 S. Ct. 2861 (2013).

³²¹ It did not matter that Senate Democrats used pro forma sessions to block President George W. Bush from making similar recess appointments; what mattered was party loyalty. See Peter Schroeder, *Reid Backs Obama After Using Pro Forma Sessions to Block Bush*, THE HILL (Jan. 4, 2012, 5:13 PM), <http://thehill.com/blogs/on-the-money/banking-financial-institutions/202335-reids-backs-obama-for-ignoring-pro-forma-sessions-he-once-pushed>.

³²² In the NLRB case, D.C. Circuit judge and former Senate Legal Counsel Thomas Griffith lamented the fact that the Senate did not formally participate in the case, saying that "the court is [now] left guessing at whether the Senate did, in fact, consider itself in session when the appointments were made." Stephen Dinan, *Court Puts Doubt on President's Actions in Recess; Ruling Could Change Tradition*, WASH. TIMES, Dec. 6, 2012, at A1.

³²³ That dispute, *Morrison v. Olson*, 487 U.S. 654 (1988), involved the constitutionality of the independent counsel. See Brief of United States Senate as Amicus Curiae at 1, *Morrison v. Olson*, 487 U.S. 654 (No. 87-1279); Brief of the Speaker and Leadership Group of the House of Representatives, Amici Curiae at 1, *Morrison v. Olson*, 487 U.S. 654 (No. 87-1279).

up as a unified institution, and the profound differences between the structure and orientation of the House and Senate counsel. Lawmakers, especially in today's polarized Congress, are not interested in Congress's institutional prerogatives vis-à-vis the executive. Accordingly, although the House and Senate counsel are well positioned to defend the proceedings of their respective chambers, there is little reason to believe that either counsel has the capacity to represent Congress in court in defense of federal statutes.

III

CONSTITUTIONAL LIMITS ON CONGRESS IN COURT

The House and Senate counsel clearly reflect the norms of their distinct institutions. For that reason, both offices seem well equipped to represent their respective chambers in matters that are confided to them by the Constitution. And that is much of what the two counsel offices do—advising members on internal chamber affairs and assisting members with House or Senate investigations, including the filing of lawsuits to enforce subpoenas. On the other hand, the House and Senate counsel are ill equipped to speak the voice of Congress. Lawmakers are generally uninterested in defending Congress's institutional prerogatives, and the two chambers are fundamentally different from each other. More significant, as confirmed by Supreme Court precedent (the focus of this Part), neither Congress nor its components have the constitutional power to intervene on behalf of federal laws in court.

At the outset, it is worth highlighting what the Supreme Court did and did not say about Congress's power to defend federal statutes in *United States v. Windsor*. To start, when granting certiorari in *Windsor*, the Court directed the parties to argue whether the House had standing to pursue the litigation (and appointed amicus to argue against jurisdiction).³²⁴ When deciding *Windsor*, however, the Court did not reach that issue;³²⁵ instead, it concluded that the executive had standing because the lower court decision invalidating DOMA adversely affected the government.³²⁶

³²⁴ See *United States v. Windsor*, 133 S. Ct. 786, 787 (2012) (directing the parties to address “whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case”). For an argument that the standing of the executive and legislature does not depend solely on Article III, see generally Grove, *supra* note 32 (contending that executive and legislative standing depends in large part on the provisions conferring power on those institutions, principally Article II and Article I).

³²⁵ See *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (noting that the Court “need not decide” whether the House BLAG has standing on its “own authority”).

³²⁶ *Id.* at 2686. One of us contends that the executive lacked standing to appeal in *Windsor*. See Grove, *supra* note 32 (manuscript at 20–22) (contending that executive standing depends in large part on the powers conferred by Article II and that the executive lacks the Article II power to appeal when it declines to defend a federal law).

At the same time, no Justice in *Windsor* challenged the power of the House or the Senate to sometimes stand in for the executive and defend federal statutes. Justice Anthony Kennedy's majority opinion both complimented the House for its "capable defense of the law" and approvingly noted that the Ninth Circuit Court of Appeals "properly . . . invit[ed] and accept[ed] briefs from both Houses of Congress" in *INS v. Chadha*,³²⁷ which involved a statute authorizing a legislative veto.³²⁸ Justice Antonin Scalia's dissenting opinion, while taking the majority to task for allowing the executive to pursue the case,³²⁹ nonetheless suggested that the House or the Senate might have independent authority to defend federal statutes in separation of powers cases.³³⁰ In particular, Justice Scalia—also discussing *Chadha*—noted both that it was "entirely reasonable" for the DOJ to "declin[e] to defend legislation that in its view infringe[d] upon Presidential powers" and that "the House and Senate were threatened with [the] destruction of what they claimed to be one of their institutional powers."³³¹ Finally, in a separate dissenting opinion, Justice Samuel Alito concluded that the House had standing to defend DOMA.³³² Justice Alito found that the invalidation of DOMA limited the House's power to legislate, that the House "was a necessary party to DOMA's passage," and that the Supreme Court's decision in *Chadha* endorsed the principle that "'Congress is the proper party to defend the validity of a statute' when the Executive refuses to do so on constitutional grounds."³³³

For reasons we have already detailed and will reiterate in this Part, we think that Congress cannot defend federal statutes. It does not matter whether a lower court invalidated the statute; it does not matter if the separation of powers are implicated; and it does not matter if the DOJ declines to defend the statute. The House and the Senate are never proper parties in legal challenges to the constitutionality of federal law; instead, the House and the Senate are only proper parties in cases implicating each chamber's Article I power to establish "Rules of its Proceedings."³³⁴

³²⁷ *Windsor*, 133 S. Ct. at 2687, 2689.

³²⁸ See *INS v. Chadha*, 462 U.S. 919, 953–54, 959 (1983).

³²⁹ *Windsor*, 133 S. Ct. at 2701–02 (Scalia, J., dissenting) (concluding that the DOJ could not pursue a case in which it agreed with the law's challengers because there was insufficient "adverseness" between the parties).

³³⁰ *Id.* at 2700 (Scalia, J., dissenting) (noting how in *INS v. Chadha*, the Supreme Court had allowed the House and Senate to intervene to defend the one-house legislative veto after the executive declined to defend that power).

³³¹ *Id.* at 2700 & n.2 (Scalia, J., dissenting).

³³² See *id.* at 2712 (Alito, J., dissenting).

³³³ *Id.* at 2713–14 (Alito, J., dissenting).

³³⁴ U.S. CONST. art. I, § 5.

As we have seen, the Constitution clearly separates the enactment of federal law from its implementation—sharply limiting Congress’s control over the latter.³³⁵ The Supreme Court has “strictly enforced” this structural principle.³³⁶ For example, in *Bowsher v. Synar*³³⁷ and *MWAA v. Citizens for Abatement of Aircraft Noise*,³³⁸ the Court emphasized that “agent[s] of Congress” may not exercise executive or administrative functions.³³⁹ “The structure of the Constitution does not permit Congress to execute the laws”³⁴⁰ The only exception is the Article I, Section 5 power of the House and Senate to enforce internal rules.³⁴¹ The House or the Senate therefore can pursue its legislative mission by issuing subpoenas, finding recalcitrant witnesses in contempt of Congress, and seeking judicial enforcement of subpoenas.

In separating legislation from implementation, moreover, the Constitution makes clear that Congress may not control those implementing federal law—outside the appointment, statutory, and removal mechanisms specified in the Constitution. In *Buckley v. Valeo*,³⁴² the Court held that Congress may not “vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.”³⁴³ The Court thus invalidated provisions of the Federal Election Campaign Act that permitted members of Congress to appoint FEC commissioners.³⁴⁴ Furthermore, in *INS v. Chadha*,³⁴⁵ the Court struck down the one-house legislative veto, concluding that Congress can direct the executive’s implementation of federal law only through statutes enacted via bicameralism and presentment.³⁴⁶ Finally, in *Bowsher*,

³³⁵ See *supra* Part I.A.

³³⁶ John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 648–49 (1996) (“In an era in which the Supreme Court has flexibly applied separation of powers doctrine, the Court has nevertheless strictly enforced the principle that Congress cannot directly participate in the implementation of Congress’s own laws.” (citation omitted)).

³³⁷ 478 U.S. 714 (1986).

³³⁸ 501 U.S. 252 (1991).

³³⁹ *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 255, 276 (1991) (invalidating a statute that gave a “Board of Review” staffed by members of Congress “veto power” over decisions made by the Metropolitan Washington Airports Authority and stating that “[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it”); see *Bowsher v. Synar*, 478 U.S. 714, 736–37 (1986) (invalidating the Balanced Budget and Emergency Deficit Control Act insofar as it granted the Comptroller General, an agent of Congress, executive functions).

³⁴⁰ *Bowsher*, 478 U.S. at 726.

³⁴¹ See U.S. CONST. art. I, § 5.

³⁴² 424 U.S. 1 (1976) (per curiam).

³⁴³ *Id.* at 135.

³⁴⁴ See *id.* at 126–27, 140.

³⁴⁵ 462 U.S. 919 (1983).

³⁴⁶ See *id.* at 953–54, 959 (stating that “[w]ithout the challenged [legislative veto], this could have been achieved, if at all, only by legislation requiring deportation”).

the Court concluded that impeachment was the exclusive mechanism by which Congress could remove executive officials, stating that “[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.”³⁴⁷

The defense of federal statutes is a key component of the execution of federal law. If a court invalidates a statute, the government can no longer enforce that law against future violators. Even a narrow construction of a law significantly impacts future enforcement efforts. That is presumably why jurists and scholars have long assumed that the defense of federal statutes falls within the executive branch’s duty to “take Care that the Laws be faithfully executed.”³⁴⁸ In order to enforce a law in federal court, the executive must be prepared to defend that law against constitutional challenge.

A few commentators have, however, recently suggested that the defense of federal statutes is not an executive function—or at least that it is not a sufficiently “core” executive function as to preclude the involvement of Congress.³⁴⁹ To use the recent debate over the Affordable Care Act as an illustration,³⁵⁰ these scholars seem to draw a distinction between litigating the constitutionality of a law (like the individual mandate) and actually enforcing that law against someone (by, for example, assessing a tax on an individual for refusing to buy health insurance). The argument would be that Congress could defend the individual mandate in court but could not itself assess the tax, for the latter is more central to law execution.

³⁴⁷ *Bowsher v. Synar*, 478 U.S. 714, 722–23, 736 (1986).

³⁴⁸ See *supra* note 31 and accompanying text. This assumption necessarily underlies the debate over whether the President has a “duty to defend” federal laws—even those that he considers invalid. Such constitutional defense could not be a “duty” unless it was an executive function. See *supra* notes 34–36 and accompanying text (discussing the debate). Notably, most scholars who argue that there is no “duty to defend” do not deny that the defense of federal statutes is an executive function. These scholars acknowledge that the President should defend most federal laws but argue that he need not defend laws that, in his considered judgment, are unconstitutional. See Devins & Prakash, *supra* note 32, at 533 (“[F]or something to be law subject to the execution duty, it must be substantively proper.”); Marcott, *supra* note 34, at 1320 (“The Take Care Clause . . . does not require the Executive to unquestioningly support the dictates of Congress . . .”).

³⁴⁹ See Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1219–20 (2012) (“Defending [a] law . . . does not focus on the operation of the law and generally will not affect its operation at all. . . . [T]he Executive simply provides the court with its understanding of what the Constitution requires . . .”); see also Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 591–92 (2012) (asserting that, if Congress seeks a declaratory judgment on the constitutionality of a law, Congress is not “controlling the execution of law”).

³⁵⁰ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (upholding, as a tax, “the individual mandate,” which requires individuals to buy health insurance).

But we do not believe that the lines of responsibility can be so easily separated. If Congress were a party in charge of defending a federal statute, it could exercise considerable power over the enforcement of that law. In the above example, if two different persons challenged the individual mandate, and two lower courts invalidated it on an as-applied basis, Congress could decide to appeal one ruling and not the other. That litigation decision would then prevent the executive from enforcing the law against one individual (the person with the unappealed lower court victory) and not the other.

This is not a hypothetical scenario. In the DOMA litigation, although the House of Representatives challenged many lower court decisions invalidating DOMA, the House did not seek to appeal every case. For example, the House (and the executive) let stand a bankruptcy court ruling against DOMA.³⁵¹ This litigation decision ensured that one same-sex couple was exempt from DOMA, while the House continued (in the cases it opted to appeal) to argue that DOMA could be validly applied to prevent the recognition of many other same-sex marriages.³⁵² Although it may be inevitable that a government litigator will exercise such “prosecutorial discretion” (indeed, the executive is often selective about the cases it appeals), our point is that this discretionary choice gives the *congressional* litigant a tremendous amount of influence over the execution of federal law.

This example underscores the distinction between congressional participation as intervenor versus amicus curiae. In both roles, an agent of Congress may present legal arguments in favor of a federal statute. But only intervenor status gives Congress the power to decide which cases (and which appeals) to pursue and thus the discretion to decide against which parties the law will be enforced.³⁵³ Such

³⁵¹ See Chris Geidner, *U.S. Trustee Withdraws Appeal of Gay Couple's Bankruptcy Court DOMA Victory*, METRO WEEKLY (July 7, 2011, 11:10 AM), <http://www.metroweekly.com/poliglot/2011/07/us-trustee-withdraws-appeal-of.html> (observing that the executive branch withdrew an appeal from a bankruptcy court decision invalidating DOMA after the House opted not to appeal the case). In fact, the executive branch stopped enforcing DOMA in any bankruptcy case after the House decided not to defend the statute in that context. *Id.* (quoting letter from U.S. Trustee stating that “[t]his decision to stop filing motions to dismiss bankruptcy petitions avoids generating costly and time-consuming constitutional litigation that neither the BLAG nor the Department plans to defend”).

³⁵² Along similar lines, the House counsel declined to defend a federal statute that purports to deny benefits to same-sex spouses of veterans. See Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Withdraw as Intervenor-Defendant at 1, *McLaughlin v. Panetta*, No. 1:11-cv-11905 (D. Mass. July 18, 2013) (“[T]he House has determined, in light of the Supreme Court’s opinion in *Windsor*, that it no longer will defend [the veteran’s benefits] statute.”). The House’s decision not to defend likely ensures that the law will not be enforced against that same-sex couple.

³⁵³ See Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1566 (2012) (“[A]mici have no appeal rights, while intervenor-defendants may . . . be entitled to appeal even when their aligned parties elect not to.”).

“prosecutorial discretion” is, in our view, clearly an executive function. As a result, Congress is not a proper party to perform that function.³⁵⁴

But regardless of how one views the defense of federal statutes by Congress as a whole, unilateral defense by the House or Senate counsel is deeply problematic. The bicameral structure of Congress is a crucial part of our constitutional scheme of separated powers. As the Supreme Court stated in *INS v. Chadha*, “[W]hen the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action.”³⁵⁵ “These exceptions are narrow, explicit, and separately justified”³⁵⁶ As discussed, each house is constitutionally authorized to enforce internal rules, including by seeking judicial enforcement of subpoenas. But neither house of Congress has the power to defend their joint work product in court.

These structural constraints (the separation of law enactment from implementation and the requirement of bicameralism) help explain why the House and the Senate have standing to enforce committee subpoenas but lack standing to defend federal laws. As one of us argues in a separate work, the “standing” of federal institutions—that is, the power of those institutions to bring suit or appeal in federal court—cannot be determined solely by an analysis of Article III.³⁵⁷ Federal institutions must have affirmative authority for their actions, including the power to invoke federal jurisdiction at trial or on appeal. That affirmative authority does not come from Article III, which defines the federal “judicial Power” and does not purport to confer power on the executive or the legislature. Instead, executive and legislative standing depend in large part on the provisions conferring power on those institutions, principally, Article II and Article I.³⁵⁸

This insight helps explain why the executive, but not Congress, may defend federal laws on behalf of the United States. In the abstract, it may be hard to see why any of the individual government institutions needed for the enactment of federal law—the House, Senate, or President—should have the power to defend their joint handiwork in court. Yet the Supreme Court has repeatedly granted the executive branch standing to represent the interests of the United States in federal court with respect to constitutional and other litiga-

³⁵⁴ See Grove, *supra* note 32 (manuscript at 12–13, 43–46) (arguing that Congress should not be permitted to exercise the prosecutorial discretion that the executive exercises when it enforces or defends federal law).

³⁵⁵ 462 U.S. 919, 955 (1983).

³⁵⁶ *Id.* at 956.

³⁵⁷ See Grove, *supra* note 32.

³⁵⁸ *Id.* (manuscript at 2–3).

tion.³⁵⁹ Congress itself acknowledged the executive's broad standing when it in 1937 authorized the executive to intervene in any private suit involving the constitutionality of federal law.³⁶⁰ The executive branch's broad standing stems from its duty to "take Care that the Laws be faithfully executed."³⁶¹ As noted, that duty encompasses a corollary obligation to defend most (and, in the view of some scholars, virtually all) federal statutes in court.³⁶²

By contrast, there is no constitutional provision that similarly authorizes Congress or one of its components to bring suit on behalf of the United States. The House and the Senate do, however, have affirmative constitutional power to act unilaterally in the realm of internal chamber proceedings.³⁶³ To make this power effective, the House and the Senate must at times seek judicial enforcement of subpoenas and other internal rules. For these reasons, the House and the Senate have standing to enforce their internal rules but lack standing to defend federal statutes in court.³⁶⁴

We believe that the constitutional text, structure, history, and Supreme Court precedents strongly support our contention that neither Congress nor its components may intervene in federal court to defend federal laws. Nevertheless (and somewhat remarkably), the Court in *Chadha* found that the House and Senate counsel *could* intervene to defend a statute when the executive branch declined to do so—even

³⁵⁹ See, e.g., *United States v. Raines*, 362 U.S. 17, 27 (1960) (concluding that Congress may authorize the Attorney General to bring suit to enforce constitutional rights); *In re Debs*, 158 U.S. 564, 586 (1895) ("[W]henver the wrongs complained of are such as affect the public at large, . . . the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts . . ."), *abrogated in part on other grounds* by *Bloom v. Illinois*, 391 U.S. 194 (1968); see also Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 627 (2005) ("Federal courts regularly adjudicate government enforcement actions that would lack 'injury in fact' if brought by private plaintiffs.").

³⁶⁰ See S. REP. NO. 75-963, at 2 (1937) ("Whenever the United States is concerned, the interest which will support its right to intervene is not limited to pecuniary interest. It extends to rights and duties related to sovereignty.").

³⁶¹ See Grove, *supra* note 32 (manuscript at 8) (arguing that the Take Care Clause is the constitutional source of executive standing to enforce and defend federal law); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 794 (2009) (noting that the Take Care Clause supports executive standing in enforcement actions); see also Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2256 (1999) (asserting that the executive's broad standing in criminal prosecutions must stem from Article II).

³⁶² For further discussion of executive standing to defend federal laws, see Grove, *supra* note 32 (manuscript at 13–17).

³⁶³ See U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

³⁶⁴ For further discussion of legislative standing, see Grove, *supra* note 32 (manuscript at 35–46).

as it articulated the principles that render such “congressional” intervention contrary to the constitutional scheme.³⁶⁵ *Chadha* has since served as the primary source of authority for intervention by the House and Senate counsel in subsequent constitutional litigation, including the recent challenges to the Defense of Marriage Act. Lower courts relied on *Chadha* when granting the House’s motion to intervene; the Supreme Court, although failing to rule on the standing issue, favorably cited *Chadha*.³⁶⁶ For this reason, we believe it is important to examine the apparent basis of the *Chadha* Court’s decision.

Notably, the Supreme Court did not conclude that the intervention of the House and Senate counsel was necessary to establish Article III jurisdiction in *Chadha*. The case involved the pending deportation of an undocumented immigrant (Jagdish Chadha).³⁶⁷ The Attorney General had decided to suspend Chadha’s deportation and allow him to remain in the country, but the House of Representatives (through the one-house legislative veto) overruled that decision and directed that he be deported.³⁶⁸ Chadha challenged the deportation order on the ground that the legislative veto was unconstitutional.³⁶⁹ Although the executive branch agreed with Chadha’s constitutional argument, the executive did plan to enforce the House’s order.³⁷⁰ The Supreme Court thus found that “prior to Congress’ intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha [T]he INS’s agreement with Chadha’s [legal] position does not alter the fact that the INS would have deported Chadha”³⁷¹

³⁶⁵ See *INS v. Chadha*, 462 U.S. 919, 939 (1983) (“We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.”); *id.* at 957–58 (“The bicameral requirement, the Presentment Clauses, the President’s veto, and Congress’ power to override a veto were intended to erect enduring checks on each Branch To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.”).

³⁶⁶ As discussed earlier, majority and dissenting opinions in *Windsor* approvingly cited *Chadha*. For lower court rulings, see *Revelis v. Napolitano*, 844 F. Supp. 2d 915, 924–25 (N.D. Ill. 2012) (“The House has an interest in defending the constitutionality of legislation . . . when the executive branch declines to do so.” (citing *Chadha*, 462 U.S. at 940)), and *Windsor v. United States*, 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011) (“BLAG is entitled to intervene in this action as a party defendant” (citing *Chadha*, 462 U.S. at 930 n.5, 939)), *aff’d*, 669 F.3d 169 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013). In some cases decided between *Chadha* and *Windsor*, the courts simply allowed intervention without providing a rationale. That was true, for example, of the Supreme Court in *Bowsher*. See 478 U.S. 714 (1986); *supra* note 297 and accompanying text.

³⁶⁷ See *Chadha*, 462 U.S. at 923.

³⁶⁸ See *id.* at 925–28.

³⁶⁹ *Id.* at 928.

³⁷⁰ See *id.* at 928, 939.

³⁷¹ *Id.* at 939. Although the Court at one point suggested that the presence of the House and Senate counsel was necessary for Article III jurisdiction, see *id.* at 931 n.6 (“[A]

Ultimately, the *Chadha* Court's primary rationale for permitting the intervention of the House and Senate counsel appears to have been its view that there was a long history of such "congressional" defense of federal statutes. According to the *Chadha* majority, "[w]e have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."³⁷² But, as we demonstrated in Part I, there is no such history. The Supreme Court had permitted individual components of Congress to appear *as amici curiae* on behalf of federal statutes. But the Court did not authorize intervention by any component of Congress until *Chadha*.³⁷³

Accordingly, we believe that, notwithstanding this language in *Chadha*, the weight of the evidence—text, structure, history, and Supreme Court precedent—counsels against defense of federal statutes by Congress or one of its individual components. The Constitution does not authorize Congress to defend its handiwork in federal court. Instead, the House or the Senate can go into court to enforce subpoenas or other internal rules. Unlike the defense of federal statutes, the text, structure, and history support congressional enforcement of internal rules in court.³⁷⁴

CONCLUSION

When Attorney General Eric Holder announced that the Obama administration would not defend the Defense of Marriage Act, he suggested that there was no political or legal cost to the decision. The Department of Justice would, he promised, "notify the court of [its] interest in providing Congress a full and fair opportunity to partici-

justiciable case or controversy under Art. III . . . clearly exists . . . because of the presence of the two Houses of Congress as adverse parties."), the Court ultimately found that the presence of the House and Senate counsel served only to overcome any prudential standing barriers. See *id.* at 939–40. In *Windsor*, Justice Kennedy cited *Chadha* both to establish that the dispute between the government and *Windsor* was adversarial (notwithstanding their agreement on the merits) and to establish that there were no prudential standing barriers to the Court's resolution of the case. 133 S. Ct. at 2686–87.

³⁷² *Chadha*, 462 U.S. at 940.

³⁷³ Nor did the Court supply a basis for its assertion of a "long" history of congressional defense of federal statutes. The Court cited only two cases—*Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), and *United States v. Lovett*, 328 U.S. 303 (1946). But the first case did not involve Congress at all; instead, the Court invited *private counsel* to appear as *amicus curiae* to present an alternative interpretation of the statutory provision at issue because the INS agreed with the construction of the deportee. See *Cheng Fan Kwok*, 392 U.S. at 210 n.9. And in *Lovett*, the House participated only as *amicus* in defense of a statutory provision that was unsupported by the Senate and the executive branch, and which the Supreme Court held was patently unconstitutional. See *United States v. Lovett*, 328 U.S. 303, 304, 312–13, 318 (1946). *Lovett* would not seem to provide a strong basis for congressional defense of federal statutes.

³⁷⁴ See *supra* Part II.A, B, E.

pate in the litigation” on behalf of that federal law.³⁷⁵ As we have shown, however, neither Congress nor its individual components may defend federal statutes in court. The Constitution’s text, structure, and history preclude such a role. More than that, there are profound practical problems with either the House or the Senate speaking the voice of a unified Congress.

Our argument does not, however, prevent the House or the Senate from challenging an executive decision not to defend a federal law. Each chamber’s control over its internal proceedings enables it to investigate alleged wrongdoing by the executive branch,³⁷⁶ including the refusal to defend a law.³⁷⁷ Unlike the defense of federal statutes, the Constitution’s text, structure, and history back up the power of either the House or the Senate to control internal proceedings, including the power to go to court to enforce subpoenas.³⁷⁸ Thus, when the majority leadership of the House of Representatives—led by Speaker John Boehner—objected to President Obama’s decision not to defend DOMA,³⁷⁹ the proper response was not to take over defense of the statute. But the House could have subpoenaed Attorney General Holder to testify and explain his decision. And if the Attorney General refused to comply with the subpoena, the House could have held him in contempt and filed suit against him to enforce the sub-

³⁷⁵ Letter from Eric H. Holder, Jr., Att’y Gen. of the United States, to Hon. John H. Boehner, Speaker of the House (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (stating that the President would enforce but not defend DOMA).

³⁷⁶ See *supra* Part I.A, B.

³⁷⁷ There is some doubt that the Senate has statutory authority to exercise this “contempt” power. The legislation that created the Senate Office of Legal Counsel seems to prohibit the counsel (or any other component of the Senate) from filing suit against the executive branch. See 28 U.S.C. § 1365(a) (2012) (granting federal jurisdiction to enforce any Senate subpoena except a “subpoena or order issued to . . . the executive branch”). This statutory question is not our focus, however. Our point is only that the House and the Senate have the *constitutional* power to investigate what they view as executive wrongdoing.

³⁷⁸ For this reason, the D.C. District Court was correct in rejecting the George W. Bush administration’s arguments that high-ranking executive officials could not be compelled to testify before Congress (a decision later vacated after the administration dropped its claim and allowed those very officials to testify). See *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 100 (D.D.C. 2008), *stayed pending appeal*, 542 F.3d 909 (D.C. Cir. 2008) (per curiam). For additional discussion, see *supra* notes 193–95. Likewise, the D.C. District Court was also right to reject the Obama administration’s arguments in the Fast and Furious case that “Article III does not permit judicial resolution of the Committee’s political dispute with the executive branch.” Memorandum in Support of Defendant’s Motion to Dismiss at 22, *Comm. on Oversight and Gov’t Reform v. Holder*, No. 1:12-cv-1332 (D.D.C. Oct. 15, 2012). See Gerstein, *supra* note 8. For additional discussion, see *supra* notes 190–92, 196 and accompanying text.

³⁷⁹ See Frank James & Liz Halloran, *Boehner: House Will Defend DOMA; Courts, Not Obama, Should Decide*, NPR (Mar. 4, 2011, 3:52 PM), <http://www.npr.org/blogs/itsallpolitics/2011/03/04/134268656/boehner-house-will-defend-doma-courts-not-obama-should-decide> (noting Boehner’s implication that the President “overstepped his constitutional authority” by not defending DOMA).

poena. In fact, as the Watergate example illustrates, the House could even seek testimony or documents from (and perhaps file suit against) President Obama himself.³⁸⁰ Furthermore, if both the House and the Senate object to an executive refusal to defend, they always retain the power to institute impeachment proceedings against the Attorney General (or the President).

Nor does our argument preclude the defense of federal statutes when the executive declines to defend a federal law. Courts may appoint *amici curiae* to defend statutes in place of the executive.³⁸¹ We also assume that the House or the Senate (or individual legislators) could file briefs as *amici curiae* to argue in support of a law.³⁸²

Accordingly, the House and the Senate need not sit idly by when the executive branch declines to defend a federal statute. By granting each chamber the power to establish internal proceedings, the Constitution enables either the House or the Senate to subpoena executive officials and to go to court to enforce subpoenas. In this way, the Constitution provides each chamber with a powerful mechanism to challenge the President and to expose his (possibly unpopular) decision to the public. Those are the grounds upon which the Constitution permits each chamber to do battle with the executive. The Constitution does not, however, authorize Congress or one of its components to defend federal statutes in court.

³⁸⁰ See *supra* Part I.E.

³⁸¹ See *supra* note 26.

³⁸² We recognize that this approach may itself present constitutional difficulties, to the extent that the executive branch has an exclusive license under Article II to defend federal statutes. But, as discussed, our argument focuses on the limitations on congressional power, rather than the scope of executive power. See *supra* notes 30–31 and accompanying text. For now, we bracket the executive power question and assume that the federal courts have inherent authority to appoint *amici*. For a general defense of court power to appoint *amici*, see Devins & Prakash, *supra* note 26; Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 465–67 (2009).