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A dereliction of duty

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By BRIAN BROWN

HOW DO Democrats in the Obama era respond when they lose elections? By making extraconstitutional end runs around the democratic process, if the disturbing pattern emerging across our nation is any indication.

Democratic legislators in Wisconsin and Indiana have fled their statehouses to prevent votes they know they will lose. In Washington, the administration has, without legislative authority, shifted power to administrative agencies. The thinking seems to be: Do what you want, whether or not the people agree.

President Barack Obama's announcement Wednesday that he will refuse to do his job when it comes to the Defense of Marriage Act, or DOMA, is part of this stunning pattern of rejecting the democratic process.

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Obama said that his administration would not defend the law in legal challenges because it is unconstitutional, but that it would continue to enforce the law selectively. This is incomprehensible and incoherent, except in nakedly political terms. The president is using his power to do what he - and his base - wants.

Particularly egregious is Obama's unilateral declaration that homosexuals are a specially protected class under the Constitution and that this is the reason DOMA is unconstitutional. But the Constitution does not directly say so. Congress has passed no such law. Nor has the Supreme Court ever said that homosexual people are a protected class.

Obama could not get Congress to repeal DOMA. He could not get Congress to pass the Employment Non-Discrimination Act, designating "orientation" a protected class under federal law. So he and his Department of Injustice have made up their minds to do what they want.

What do we call a leader who acts as though he is neither accountable to Congress nor bound by court precedent?

The Defense of Marriage Act passed in 1996 by large bipartisan majorities. It does two simple things: It defines marriages for federal purposes, such as spousal benefits, as the union of a husband and wife, and it clarifies that states do not have to recognize same-sex marriages performed in other jurisdictions.

The Obama administration has been appearing in court to technically defend against challenges to the law, but in practice it has been sabotaging the defense of DOMA by repudiating the clear reasons House legislators gave for passing the law, which include responsible procreation.

At least in this case, Obama's extraordinary tactics may well backfire.

Thanks to the president's dereliction of duty, the House now has a clear pathway to intervene in legal challenges. If the House does so, that would mean there will finally be lawyers in the courtroom, arguing before the judge, who actually want to uphold the statute and win their case.

There's nothing radical about one or both houses of Congress intervening in a court case; it has happened several times in recent decades.

As Hans von Spakovsky, a former Justice Department attorney and senior legal fellow at the Heritage Foundation, put it: "Congress clearly has the authority to retain special counsel to represent its interests in litigation. As history shows, Congress uses that authority most often when there is a conflict between the views of the Administration and the Legislature."

The barrier to House intervention has been that typically the House intervenes only when the administration fails to defend a law Congress believes is constitutional. Obama just removed that obstacle.

The fight for DOMA has just begun. The House should act to ensure the administration respects the limits on its powers.

Brian Brown is president of the National Organization for Marriage. This column appeared previously in The Washington Post.

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