Written by **Joe Wolverton, II, J.D.** on March 7, 2011

Rep. Franks Calls for Obama's Impeachment Over DOMA

In a letter Holder sent to Congress, the Attorney General asserted that DOMA's requirement that the federal government recognize only heterosexual marriage "violates the equal protection component of the Fifth Amendment" and therefore doesn't merit defense and should be allowed to be struck down. "This is the rare case where the proper course is to forego the defense of this statute," he wrote. The Attorney General did concede that the Obama administration will enforce the law long enough to give Congress "a full and fair opportunity" to assume the legal defense of DOMA.

Beyond his advocacy of the impeachment of President Obama, Congressman Franks stated that the Justice Department itself should be defunded if it follows through on its promise not to defend DOMA.

"I would support that in a moment," Franks commented.

What follows is a transcript of an interview of Franks conducted by Scott Keyes of Think Progress during the Tea Party Patriots Policy Summit held in Phoenix, Arizona February 25-27.

KEYES: What recourse does Congress have? Could you, for instance, defund the Department of Justice if they don't reverse course and start to enforce the Defense of Marriage Act?

FRANKS: That's probably the strongest leverage that we have….

KEYES: Is defunding, using that threat of defunding DOJ, something you would support?

FRANKS: Absolutely. I would support that in a moment….

KEYES: I know Newt Gingrich has came out and said if they don't reverse course here, we ought to be talking about possibly impeaching either Attorney General Holder or even President Obama to try to get them to reverse course. Do you think that is something you would support?

FRANKS: If it could gain the collective support, absolutely. I called for Eric Holder to repudiate the policy to try terrorists within our civil courts, or resign. So it just seems like that they have an uncanny ability to get it wrong on almost all fronts.

As radical as such a position may seem, Congressman Franks has a couple of well-known allies in his campaign. GOP presidential candidates Newt Gingrich and Herman Cain suggest that impeaching the President may be an option should he leave DOMA to twist in the wind. In fact, Cain went so far as to define Obama's refusal to defend DOMA as "bordering on treason." Predictably, Newt Gingrich has recently dialed down the volume of his personal clamor for the President's impeachment on this issue.

There is some think-tank support for Frank's proposition, as well. Matthew Vadum of the Capital Research Center tweeted that the administration's refusal to defend DOMA is an impeachable offense.

As with many other Obama administration decisions (see the still-open Guantanamo Prison and the continuing protracted foreign wars), the decision to abandon DOMA has reliable precedent in the actions of some notable Republicans.

First, there was the 1976 Supreme Court case *Buckley v. Valeo*. Robert Bork, then serving as Solicitor General in the Gerald Ford administration, was called upon to defend a legal challenge to the 1971 Federal Election Campaign Act (FECA). In a manner similar to the Holder position on DOMA, Bork refused to defend the portion of FECA (specifically the provision granting to Congress the power to appoint members to the Federal Election Commission) that he believed was an unconstitutional violation of the separation of powers.

By submitting two briefs — one supporting the bulk of FECA and the other challenging the constitutionality of the previously

mentioned section — Bork forced the FEC to file its own brief in defense of the aspect of the law he found constitutionally repugnant.

In late January of 1976, the Supreme Court issued a ruling that was mostly consistent with the position staked out by Solicitor General Bork. Later, Bork would defend his actions:

> It would seem to me not only institutionally unnecessary but a betrayal of profound obligations to the Court and to Constitutional processes to take the simplistic position that whatever Congress enacts we will defend, entirely as advocates for the client and without an attempt to present the issues in the round.

President Obama has decided to place "in the round" the provisions of DOMA that he finds personally displeasing (specifically, those defining marriage as a union of one man with one woman). The conflict in this case, as with the case of FECA and Judge Bork, is between the constitutionally mandated duty of the President (and the executive branch in general) to "take care that the laws be faithfully executed," and his oath to "preserve, protect, and defend" the Constitution. The critical question is which constitutional responsibility is paramount — that is to say, what should a chief executive do when he is required to execute a law that he reckons to be unconstitutional? Should the lawfully enacted law of the land take precedent over the presidential oath of office? The recurrence of this conflict could be avoided if each branch would confine its activities to the small and certain sphere allotted to each by the Constitution.

There is a second precedent for the Obama-Holder gambit. While serving as Deputy Solicitor General in 1990, Chief Justice John Roberts faced a similar conundrum. In the case of *Metro Broadcasting, Inc. v. Federal Communications Commission*, the issue at bar was a policy giving preferential treatment to minority-owned stations seeking a broadcast license from the FCC. President George H.W. Bush regarded this brand of racially motivated distinctions between potential licensees to be unconstitutional. Accordingly, Roberts filed a brief with the Supreme Court wherein the policy his boss found pernicious was described as "precisely the type of racial stereotyping that is anathema to basic constitutional principles." The by now predictable result was that the FCC was left to its own devices with regard to any sort of defense of the minority preference scheme.

As with so many other things, when one bothers to scratch the shiny patina of partisanship off the actions of recent presidential administrations, one finds the same base autocratic alloy. As a Democrat, Barack Obama has turned his back on DOMA so that he might proudly turn and face the homosexual stratum of his supporters. Likewise, earlier Republican administrations have gerrymandered federal statutes, carving out favorable districts and leaving the others to fall into blight.

A recent article on Reason.com presented an insightful comment on the situation:

> In fact, conservatives might even want to thank the administration. While Obama's decision was probably unnecessary to secure DOMA's eventual legal defeat, it has given the GOP a powerful campaign issue. It may also have set the stage for some political payback. As the liberal UCLA law professor Adam Winkler worried last week in response to Holder's announcement, "Think of the laws that might be undermined by the next Republican president."

It is unlikely that genuine zeal of the sentiment expressed by Congressman Franks will attract a sufficient number of adherents to sustain a winnable case of treason against President Obama, especially if based chiefly on the grounds of Obama's official and predictable disdain for the Defense of Marriage Act. A more likely scenario is that similar bricks of the evidence of the President's self-serving behavior will be joined with those of his Republican forerunners into an imposing and impenetrable wall of executive overreaching.

Photo: Rep. Trent Franks