Written by **Bob Adelmann** on April 4, 2012

# President Obama Pokes the Supreme Court Again

President Obama, commenting on the judicial review being undertaken by the Supreme Court on his premier signature legislation, ObamaCare, challenged the court to uphold his law or be considered "activists" legislating from the bench. Said the President:

> Ultimately, I'm confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress. I guess I would remind conservative commentators that for years what we've heard is the biggest problem on the bench is judicial activism or a lack of judicial restraint. For an unelected group of people to somehow overturn a duly constituted and passed law is a good example of that, and I'm pretty sure this court will recognize that and not take that step.

This isn't the first time the President has directed barbs at the Supreme Court. During his State of the Union address two years ago he looked down on the Justices seated below him and said their recent decision on *Citizens United* opened the "floodgates" to unlimited independent election spending.

This time the President's use of the words "unprecedented," "extraordinary" and "unelected"elicited howls of protest from observers such as Senator Orrin Hatch (R-Utah), who responded that "It would be nice living in a fantasy world where every law you like is constitutional and every Supreme Court decision you don't like is 'activist.' " Rep. Lamar Smith (R-Texas) joined in, saying he was "disappointed" by the President's warning:

> It is not unprecedented at all for the Supreme Court to declare a law unconstitutional; they do that on a regular basis, so it's not unprecedented at all.
>
> What is unprecedented is … the president of the United States trying to intimidate the Supreme

> Court.

Even the *Wall Street Journal* excoriated the President over his remarks, chiding him that he "needs a remedial course in judicial review." How could the President, allegedly a constitutional scholar and professor at the University of Chicago and president of the Harvard Law Review, not remember the pivotal case, *Marbury v. Madison*, decided 209 years ago and considered as perhaps the singular landmark case in the history of law? That case helped define the constitutional boundaries between the Executive and Judicial branches of the fledgling republic and was the first time in Western history that a court invalidated a law by declaring it to be unconstitutional. As noted by the *Journal*:

> In Marbury in 1803, Chief Justice John Marshall laid down the doctrine of judicial review. In the 209 years since, the Supreme Court has invalidated part or all of countless laws on grounds that they violated the Constitution. All of those laws were passed by a "democratically elected" legislature of some kind, either Congress or in one of the states. And no doubt many of them were passed by "strong" majorities.

The decision specifically ruled that "Section 13 of the Judiciary Act of 1789 is unconstitutional to the extent it purports to enlarge the original jurisdiction of the Supreme Court beyond that permitted by the Constitution. Congress cannot pass laws that are contrary to the Constitution, and *it is the role of the Judicial system to interpret what the Constitution permits*." [Emphasis added.] In writing the unanimous decision, Chief Justice John Marshal said, "The government of the United States has been emphatically termed a government of laws and not of men…"

Judge Andrew Napolitano made much the same point in this Fox News commentary:

https://www.youtube.com/watch?v=PUF2tacTbfY

Republican presidential candidate Ron Paul also weighed in on the matter by reminding his readers that not only should the Supreme Court throw out the individual mandate but the entire "monstrosity" as well:

> The insurance mandate clearly exceeds the federal government's powers under the interstate commerce clause found in Article I, Section 8 of the Constitution. This is patently obvious: the power to "regulate" commerce cannot include the power to compel commerce! Those who claim otherwise simply ignore the plain meaning of the Constitution because they don't want to limit federal power in any way.
>
> The commerce clause was intended simply to give Congress the power to regulate foreign trade, and also to prevent states from imposing tariffs on interstate goods. In Federalist Paper No. 22, Alexander Hamilton makes it clear the simple intent behind the clause was to prevent states from placing tolls or tariffs on goods as they passed through each state…

And then Paul went on to disabuse any expectation that the Supreme Court will discard any or all of ObamaCare. In fact, says Paul:

> The Supreme Court has utterly abused the commerce clause for decades, at least since the infamous 1942 case of *Wickard v. Filburn*. In that instance the Court decided that a farmer growing wheat for purely personal use still affected interstate commerce — presumably by not participating in it!

Paul also challenged the court's own decision in 1803 to declare unto itself the power referred to by the *Journal*:

> The doctrine of judicial review, which is nowhere to be found in Article III of the Constitution, has done nothing to defend liberty against extra-constitutional excesses by government. It is federalism and states' rights that should protect our liberty, not nine individuals on a godlike Supreme Court.

While providing a flashpoint of controversy in his injudicious remarks and warnings to the Supreme Court, the President does bring to the fore the primary issue: Is the U.S. government a "government of laws or of men?" As Paul concluded:

> Perhaps the most important lesson from Obamacare is that while liberty is lost incrementally, it cannot be regained incrementally. The federal leviathan continues its steady growth; sometimes boldly and sometimes quietly. Obamacare is just the latest example, but make no mistake: the statists are winning. So advocates of liberty must reject incremental approaches and fight boldly for bedrock principles. We must forcefully oppose lawless government, and demand a return to federalism by electing a Congress that legislates only within its strictly limited authority under Article I, Section 8.

*Related article*:

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