Written by **Joe Wolverton, II, J.D.** on October 8, 2016

Obama: Country Can't Function With Only Eight Supreme Court Justices

In an article published on October 4, President Barack Obama revealed that he has a woefully wrong understanding of the separation of powers, the Supreme Court, and the Constitution.

"Our most basic workings as a nation aren't possible without a functioning judiciary at every level," the president wrote in a *Huffington Post* op-ed. "Commerce is hindered and lives are put on hold. If we ever hope to restore the faith in our institutions that has eroded in recent years, we cannot tolerate a politically motivated, willfully negligent vacancy on the Supreme Court," he added.

The purpose of the piece is to point out that Republicans in the Senate are preventing the nation's highest federal court from "weigh[ing] these pivotal issues [separation of church and state to intellectual property to congressional redistricting to the death penalty] because the Court [is] one Justice short of [its] full panel of nine."

Regardless of Republican maneuvering, that a president of the United States would demonstrate such ignorance of key constitutional principles of republican government is unacceptable.

While there are several examples from Obama's article of constitutional confusion, a sampling of a few will suffice to prove the point.

First, the idea that without the opinion of the Supreme Court the country cannot function properly is ludicrous and would be laughable were it not being published by a sitting president.

The Supreme Court has usurped power not granted it in the Constitution, and its sister branches in the federal government (and state legislatures) have permitted it to continue.

For example, in 1907, former Chief Justice Charles Evans Hughes declared that "the Constitution is what the judges say it is." Or, as another tyrant once said, "L'etat c'est moi." ("I am the state.")

The pronouncement by Hughes is compelling evidence of the federal bench's systemic disregard of any sort of objective, constitutionally-based standard of interpretation. The justices regularly replace such authorities as the *Federalist Papers* with their own agenda, creating a situation where the judiciary is a subjective scene of ever-changing, never consistent "judicial review."

President Obama is apparently a fan of unconstitutional lawmaking on the part of a black-robed oligarchy.

It takes a usurper to know a usurper.

Were Americans to accept Obama's interpretation of Article III and his overly generous grant to the

courts of the power to re-write laws, we would find ourselves in the perilous situation described by Thomas Jefferson:

> At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance.

To the point, this reporter has personal experience with the establishment's method of perpetuating the myth of judicial supremacy over the Constitution. I attended law school, and for one year took a required class called (ironically) Constitutional Law. Here's a frightening fact of American legal education: in Constitutional Law we never opened the Constitution — not once. We read dozens of "key" Supreme Court decisions on constitutional issues, but we were never asked to read even a single clause of the Constitution.

No wonder, then, we find ourselves in a country where even the president promotes and publishes the doctrine of judicial review and ultimate judicial authority over issues that "touch people's lives every day."

For redress of this wrong, let's do something radical and actually read the Constitution.

Article III of the Constitution lists nine classes of cases within the jurisdiction of the federal judiciary, including the Supreme Court.

Among those nine powers, one does not find "amending the Constitution," or "voiding the will of the people," or "forcing states to accept social attitudes inconsistent with their citizens," or anything even close to amending the Constitution via judicial decision.

Article V of the Constitution sets out the amendment procedure and "whatever the Supreme Court says" is not part of the constitutionally mandated process!

Thomas Jefferson had something to say in the matter. In 1804, he wrote that giving the Supreme Court power to declare as unconstitutonal acts of the legislature or executive "would make the judiciary a despotic branch." He noted that "nothing in the Constitution" gives the Supreme Court that right.

Abraham Lincoln recognized the lack of constitutional authority for the Supreme Court's assumption of the role of ultimate arbiter of an act's conformity with the Constitution. Lincoln said that if the Supreme Court were afforded the power to declare whether an act of the federal government was constitutional, "the people will have ceased to be their own masters, having to that extent resigned their government into the hands of that eminent tribunal."

In his 1887 book *The Constitutional Law of the United States of America*, renowned German-American constitutional scholar Hermann Von Holst explained the error in accepting the Supreme Court as the ultimate arbiter of constitutional fidelity.

"Moreover, violations of the Constitution may happen and the injured cannot, whether states or individuals, obtain justice through the court. Where the wrongs suffered are political in origin the remedies must be sought in a political way," he wrote.

He continued, regarding this "aristocracy of the robe," "That our national government, in any branch of it, is beyond the reach of the people; or has any sort of 'supremacy' except a limited measure of power granted by the supreme people is an error."

It is an error now committed publicly by the president of the United States.

Finally, the president's chastising of GOP leadership for supposedly purposefully keeping the Supreme Court one justice short of its full constitutional bench is also wide of the constitutional mark.

There is no constitutional requirement of nine Supreme Court justices. No law was ever passed by Congress mandating a nine-justice Supreme Court. In fact, there have been several times in our history where the Supreme Court's bench has been more or less crowded than it was before the death of Justice Antonin Scalia created a "vacancy."

The Judiciary Act of 1789 set the number of Supreme Court justices at six. Eight years later, Congress changed the number of justices to seven. Then, 30 years later, the number of justices was set at nine. In 1863 it was briefly bumped up to 10. In 1866, the number went back to seven as a result of the Judicial Circuits Act passed by Congress. In 1869, Congress put the number of Supreme Court justices at nine and there it has stayed ever since.

There was, though, a famous attempt by President Franklin Roosevelt to pack the court with justices favorable to his socialist "New Deal" programs. Roosevelt wanted 15 justices (a new justice for every one of the sitting justices over 70 years old who refused to retire). Congress refused to give in and the number stayed at nine, as it had been set in 1869.

So, anyone familiar with the Constitution, with the will of the Founders, and with the history of the high court would recognize a few things that President Obama doesn't understand: first, the country can function just fine without the Supreme Court settling all social issues for us; second, the Supreme Court doesn't have the power to overrule the will of the people; and finally, there is no constitutional mandate of a nine-justice Supreme Court bench.

In light of this, it is ironic, then, that in the final paragraph of his op-ed, the president writes:

"We didn't grow from a fledgling nation into the greatest force for good the world has ever known by flouting the institutions that define our [sic] democracy. We did it through fidelity to the values of our founding, and an understanding that our American experiment only works when we the people have a say."

The people again and again have tried to "have a say" in the laws of their respective states and the Supreme Court has forced them to accept what they say is unacceptable.