Written by **Selwyn Duke** on December 11, 2015

Ted Cruz: President Can Ignore Unconstitutional Supreme Court Decisions

Are we Americans meant to be governed by the rule of law or the rule of lawyers? For a long time now we've been under the latter, with the belief that whatever five unelected judges on the Supreme Court say must go for 320 million citizens. But presidential candidate Senator Ted Cruz (shown) has now challenged this opinion, siding with no less a figure than Thomas Jefferson, who long ago warned that such an opinion would make our Constitution a "suicide pact."

Cruz fired his shot across judicial supremacy's bow in a recent appearance on EWTN, a global Catholic network, while being interviewed by Princeton University professor Robert George (video below. Relevant portion begins at 13: 52).

Asking Cruz about "judicial power," George pointed to the Supreme Court's checkered past rulings, mentioning the *Dred Scott* case, the 1905 case of *Lochner v. New York*, *Roe v. Wade*, and this year's *Obergefell v. Hodges* faux-marriage decision. The professor then said, as presented by *Crisis* magazine:

> Some people say that a president must always accept the court's interpretation of the Constitution no matter how dubious that interpretation is; that we have to treat it as the law of the land, binding not just on the parties to the case but on other officials of government, beginning with the president. Abraham Lincoln though, as you know, vehemently disagreed with that idea of judicial supremacy, saying that to treat unconstitutional court rulings as binding in all cases, no matter what, no matter how usurpative, no matter how anti-constitutional, would be for the American people — and I quote now the Great Emancipator—"to resign their government into the hands of that eminent tribunal."

George then asked if Lincoln was right and if Cruz would defy the court on *Obergefell*, to which the senator responded:

> I agree with President Lincoln and courts do not make law.…The court interprets the law, applies the law.… And, you know, this is an area of really striking divide in this presidential election.…They're [sic] quite a few Republicans who, when the gay "marriage" decision came down, they described it as the settled law of the land. It's final; we must accept it, move on and surrender.
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> Those are almost word for word Barack Obama's talking points and I think they are profoundly wrong. I think the decision was fundamentally illegitimate. It was lawless. It was not based on the Constitution. I agree very much with Justice Scalia, who wrote a powerful dissent saying, this decision is a fundamental threat to our democracy.… And indeed, Justice Scalia, in the penultimate paragraph of his dissent, predicts, harkening back to President Lincoln defying *Dred Scott*, that state and local officials will refuse to obey this lawless decision. It is remarkable to see a Supreme Court justice saying that would be the consequence of this.

In point of fact, Justice Scalia issued a stern warning to the Court in his *Obergefell* dissent, quoting Alexander Hamilton in *Federalist* No. 78 and writing, "The Judiciary is the 'least dangerous' of the federal branches because it has 'neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm' and the States, 'even for the efficacy of its judgments.' With each decision of ours that takes from the People a question properly left to them — with each decision that is unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court — we move one step closer to being reminded of our impotence."

The reality is that the judiciary has no men under arms; it cannot enforce its rulings. Enforcement is the executive branch's role, and the Court has no ability to coerce a president into acting on its decisions.

But isn't this just a matter of might makes right? Doesn't the court have the legal authority of its judicial-review power to nullify or invalidate a legislative or executive action it deems unconstitutional? Doesn't this give it the moral high ground?

The Constitution is our land's supreme law, above, of course, the Supreme Court; this is why the Court will rule against a law citing the Constitution's authority and not merely its own. Yet where does the notion that the Court has judicial-review power — and that all three branches of government must be constrained by its judgments — come from?

It is not in the Constitution but was declared by the Court on, in essence, *its own authority* — in the 1803 *Marbury v. Madison* decision.

So the Court gave the Court its oligarchic powers. And "oligarchic" is not too strong a word, nor a new characterization. As Thomas Jefferson wrote two centuries ago, "To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy." He further said that if the judicial-supremacy thesis is sound, "then indeed is our constitution a complete *felo de se*" — a suicide pact. For judicial supremacy gives to one branch alone, continued Jefferson, "the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation.…The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please."

And the twisting continues apace as our Republic twists in the wind and we are governed by the ruler and not the rule. Justice Scalia made mention of this in his *Obergefell* dissent as well, writing, "It is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's [marriage] decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."

One of the basic ideas behind our American government is "balance of power," both between the feds and the states and among the three governmental branches. Judicial supremacy makes a mockery of this, confusing the Supreme Court with the Supreme Being and giving one branch — whose prominent members aren't even elected by the people and cannot be recalled by them — complete trump power over the other two. To consider it legitimate is to believe our Founders fought one tyrant living overseas in the name of establishing a tribunal of nine tyrants on our own soil.

But they didn't, which is why judicial supremacy wasn't written into the Constitution. To accept it is to yield to circular reasoning: "The courts have the ultimate say in the meaning of law. And how do I know? The courts have told me so."