

Obama submits to right-wing judge over health care law

Tom Carter
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On April 2, replying to a question from a reporter about three days of arguments held by the Supreme Court the preceding week on challenges to the administration's flagship health care "reform" legislation, the Patient Protection and Affordable Care Act (PPACA), President Obama said, "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."

He went on to add, "And I'd just remind conservative commentators that for years what we've heard is, the biggest problem on the bench was judicial activism or a lack of judicial restraint—that an unelected group of people would somehow overturn a duly constituted and passed law."

In response, a Republican federal appeals court judge, Jerry Smith, who was part of a panel of judges hearing a separate challenge to the Obama health care law, went out of his way to criticize Obama's statements from the bench. Smith then ordered the Obama administration's lawyers to defend the president's comments.

Smith, a Reagan appointee, declared: "I would like to have from you by noon on Thursday, that's about 48 hours from now, a letter stating what is the position of the attorney general and the Department of Justice in regard to the recent statements by the president, stating specifically and in detail in reference to those statements what the authority is of the federal courts in this regard in terms of judicial review. That letter needs to at least three pages single spaced, no less, and it needs to be specific."

The doctrine of judicial review is the power of the federal judiciary, uncontroversial since 1803, to strike down unconstitutional laws. Smith's order was dubbed "Obama's homework assignment" in the media.

To begin with, Smith's order was clearly illegitimate from a legal standpoint. The Obama administration lawyers in the case before Smith had not raised the issue of judicial review or challenged the court's authority to strike down unconstitutional laws. In fact, Smith made his order after demanding to know whether the executive branch recognized the power of judicial review, and Obama administration lawyer Dana Lydia Kaersvang answered yes. But Smith went on anyway, becoming, according to one account, "very stern."

As a matter of law, a judge is restricted to consideration of what is in the record in a particular case, i.e., the evidence, testimony, and arguments presented in court and in the submissions of the attorneys. Obama's statements were made out of court, they were never presented to Judge Smith, and they related to a different case that was pending in the Supreme Court, not in the Fifth Circuit.

Judge Smith's order served no other purpose than the most shameless political grandstanding. It was designed to contribute to the ongoing right-wing campaign to seize on the unpopular and socially regressive Obama health care legislation to attack federal social programs in general.

Last month, the Supreme Court presided over three days of oral arguments regarding a challenge to the constitutionality of the Obama health care law. The court's right-wing bloc utilized the opportunity to lay the pseudo-legal foundations for an attack that threatens virtually all of the federal social legislation enacted since the New Deal, including social security, Medicaid, Medicare, workplace safety, and anti-discrimination laws. A decision is expected in June. (See: "Supreme Court arguments on Obama health care law set stage for legal assault on social programs".)

Given the far-reaching implications of the doctrines

announced by the Supreme Court's right-wing bloc, Obama's comments on April 2 were relatively bland. One recalls by way of comparison Franklin D. Roosevelt's angry denunciations of the Supreme Court after it struck down popular New Deal legislation in 1935: "We thought we were solving it, and now it has been thrown right straight in our faces." Instead, Obama—advertised as a former "constitutional law professor" at the University of Chicago Law School—provided virtually no indication of the legal implications of the previous week's Supreme Court proceedings.

Nevertheless, it goes without saying that Obama's remarks concerning "judicial activism" that were criticized by Smith were not a challenge to judicial review, but a statement of the obvious: the Supreme Court's right-wing faction proceeds with a political agenda, not from precedent or principle, concocting or manipulating legal theories to suit its purposes.

Meanwhile, right-wing judges and legal commentators have for decades criticized their ostensibly liberal opponents in the same language employed by Obama, denouncing them as "judicial activists" or for a "failure to exercise judicial restraint." Smith's invocation of judicial review is a red herring.

Any president in US history would have been well within his rights to ignore Smith's order, to publicly denounce it as political gamesmanship, or to submit a sharply worded one-sentence retort. Instead, the Obama administration lawyers last Thursday dutifully submitted their three-page, single-spaced letter signed by Attorney General Eric Holder himself. The letter in no way challenged Smith's order, legally or politically, and it accepted the issue of judicial review as the framework: "the power of the courts to review the constitutionality of legislation is beyond dispute," Holder wrote.

The Obama administration's obsequious response to Smith's order, in the context of a full-scale right-wing assault on a century of federal social programs, recalls Obama's recent retreat on the subject of contraceptives and the separation of church and state. (See "Obama caves in to Catholic Church, religious right on contraceptives".) Obama prefaced his capitulation to religious fundamentalists with the phrase, "as a Christian ..."

The modus operandi of Obama and the Democratic

Party when it confronts criticism from the right is to kowtow, apologize, and seek an accommodation with the critics.



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