Obama Didn't Deny Court's Right of Review

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I thought March was the month for madness. So what explains this month’s wacky exchange between federal judge Jerry Smith and the White House? It started when President Obama said he was “confident” the Supreme Court would not take the “unprecedented, extraordinary step of overturning” the health care law that had been enacted “by a strong majority of a democratically elected Congress.” Obama reminded conservatives that they’re the ones who usually complain about “judicial activism” — when “an unelected group of people” overturns “a duly constituted and passed law.”

These comments shook poor Judge Smith, a Reagan appointee, to his core. Was the President saying that judges lack the power to declare federal laws unconstitutional (what lawyers call the power of “judicial review”)? He asked the Justice Department to provide him with a letter and insisted it be “at least three pages single-spaced, no less.”

Two days later Attorney General Eric Holder complied. The judge, it turned out, could relax. As the letter explained, “The power of the courts to review the constitutionality of legislation is beyond dispute. The Supreme Court resolved this question in Marbury v. Madison.”

What a relief!
Here’s my take on what President Obama said. His remarks were perfectly consonant with what one might expect from a thoughtful educated lawyer who had once taught constitutional law.
Was it wrong for the president to express concern about an “unelected group of people” overturning a law enacted by a “democratically elected” legislature? Hardly. The question of why unelected judges can overturn laws passed by politically accountable representatives is central to all of constitutional law. After all, we live in a democracy, so why should nine unelected judges override the will of popularly elected representatives?

You’re probably thinking the answer is obvious: Judges should just strike down laws that conflict with the Constitution. But the Constitution speaks in only majestic generalities, so judges have no choice but to exercise discretion in interpreting it. In doing so, they inevitably confront the question of when it makes sense for them to trump the actions of elected representatives.

During the second half of the 20th century, the Supreme Court largely used its power of judicial review to protect individual and minority rights, interests that are unlikely to be adequately protected through a purely democratic political process. But the court did not always use its power that way, which leads to President Obama’s observation that overturning the health care law would be an “unprecedented, extraordinary step.”

The president was referring to how the Supreme Court used its power during the first half of the 20th century. During that period, the court routinely struck down economic regulations and characterized its earlier “judicial activism” as a mistake. From then on, it left it to the political process to place limits on economic regulation. (In other words, if people don’t like Obamacare, they can elect representatives who will repeal it.)

So when Obama said it would be an “unprecedented, extraordinary step” for the court to overturn the health care law, he was largely right. While there is precedent for the Court overturning federal economic regulations, it has not been relied upon for 75 years. If the Court were suddenly to do so now, it would be a sea change.

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