

Court's Obama order a 'hissy fit' - CNN.com

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Editor's note: Jeffrey Toobin is a senior legal analyst for CNN and a staff writer at The New Yorker magazine, where he covers legal affairs. His new book, "The Oath: The Obama White House vs. the Supreme Court," will be published by Doubleday in September.

(CNN) -- The Fifth Circuit's homework assignment to the Department of Justice is a disgrace -- an embarrassment to the federal judiciary. Still, it's a useful window on the contemporary merger of law and politics.

To review: On Monday, following the contentious Supreme Court arguments on the health care law last week, President Obama vigorously defended the constitutionality of the Affordable Care Act. "I continue to be confident that the Supreme Court will uphold the law," he said during a White House news conference. "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. 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."

Cue the phony outrage. It's phony because the president was simply exercising his First Amendment right to defend the law. He was not threatening anyone. (And how could he threaten life-tenured federal judges anyway? Threaten to withhold invitations to state dinners?)

He was making the same argument that conservatives have often made against judicial activism -- that judges should, in general, defer to the wishes of the democratically elected branches of government.

What makes this story extraordinary is that the phony outrage didn't come from a traditional political opponent, but rather a trio of judges on the United States Court of Appeals for the Fifth Circuit. In the course of an argument on another aspect of the health care law, Judge Jerry Smith said to the Justice Department lawyer that it appeared to him that the president said "that it is somehow inappropriate for what he termed 'unelected judges' to strike acts of Congress . . . he was referring, of course to Obamacare."

Smith said "that has troubled a number of people who have read it as somehow a challenge to the federal courts, or to their authority, or to the appropriateness of the concept of judicial review." And Smith raised the question of whether the president was challenging the authority of *Marbury v. Madison*, the landmark 1803 case that established the right of the courts to strike down acts of Congress. Of course, Obama issue no such challenge to *Marbury* or the courts' right of judicial review.

Health care reform and Medicaid



Then, even more incredibly, Smith and his two colleagues -- all Republican appointees -- gave the Justice Department lawyers a homework assignment. They demanded a letter of

"no less than three pages, single spaced," due on Thursday, explaining the president's remarks.

This is not judging. This is a judicial hissy fit. The Supreme Court will determine the constitutionality of the health care law, and the president will, as he must, abide by that judgment whether he agrees with it or not. In the meantime, however, the president, like all Americans, enjoys the right to express himself on what the court should do in that or any other case.

With its petulant order to the Justice Department, the Republican judges performed a peculiar, if useful, kind of service to the public -- reminding us of the partisan nature of much of the federal judiciary. The Supreme Court's decision in the health care case may offer a similar lesson.

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