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For Obama Crowd, Judicial Activism Suddenly Isn't Cool Anymore

By Ilya Shapiro and Timothy Sandefur

President Obama and his supporters have had a turbulent relationship with Supreme Court. It reached a low point when he said that striking down his massive health care overhaul—which he said “was passed by a strong majority of a democratically elected Congress”—would be an act of illicit “judicial activism.” Though the president later backtracked, his allies continue to lament the prospect that the Supreme Court will do its job—most recently in a [Chicago Tribune](#) *op-ed* penned by House Minority [Nancy Pelosi](#) this week.

The episode harkens back to a nasty chapter in legal history: the clash between the Court and President Franklin Roosevelt during the 1930s. Fortunately, today’s Americans are unlikely to welcome a repeat of that confrontation, and President Obama would be wise not to try impugning the High Court, as Roosevelt did.

FDR’s fight with the Court began after the justices struck down some of the New Deal’s largest components. It is well to remember how absurd these programs were: in *Schechter Poultry v. United States*, for example, the justices invalidated a law that barred grocery shoppers from choosing which chicken they wanted—buyers were forced to reach into a cage and pick a random chicken, the idea being to protect farmers from having to charge less for scrawnier birds. That law—like other programs forcing farmers to destroy food to raise prices—was meant to boost farmers’ income, but it meant less food for everyone, an awful idea in the depths of a Depression, and one that overstepped constitutional boundaries. The Constitution only allows Congress to regulate interstate commerce—not to control prices at neighborhood farmer’s markets.

The justices unanimously ruled that law invalid. But Roosevelt—who said the Constitution was “superseded entirely by what has happened and been learned” since its ratification—was furious. Accusing the justices of “activism,” he proposed a bill that would “save the Constitution from the Court” by allowing him to appoint six new justices, a new majority.

Republicans and Democrats alike denounced the “Court-Packing Plan” as an effort to exempt the president from checks and balances. Journalists called it “revolutionary,” and a “bloodless coup.” Polls showed 60 percent of people opposed the plan, wary that neutering the Court could endanger their rights under future administrations. Congress killed the proposal, but not before it became an albatross for the Administration, and one with lasting consequences. Historian Jeff Shesol argues that Roosevelt’s “hubristic” plan “wrenched” the

Democratic party in two and “helped fracture the New Deal coalition.” President Obama has even less to gain by picking a fight with the Court, since polls now show that two-thirds of Americans, including most Democrats, hope the Court will strike the down the individual mandate.

But in 1937, in a very different political climate, the justices gave in. They reversed began upholding New Deal laws, expanding Congressional power under the Commerce Clause and erasing long-standing constitutional protections. Those precedents later proved powerful obstacles against the next generation’s efforts to secure individual freedoms. Over the following decades, the Court slowly began to protect privacy rights, religious liberty, and racial equality—but only over the objections of Roosevelt appointees who argued that New Deal precedents allowed lawmakers to override those freedoms. For instance, in 1943, when the Court ruled that states could not force Jehovah’s Witnesses to pledge allegiance to the flag, Justice Felix Frankfurter—an FDR favorite—dissented, arguing that since the 1937 cases let government dictate how people use property and what prices businesses can charge, government should also be free to control people’s religious expression. Likewise, Justice Hugo Black refused to join the Court’s 1965 ruling that the Constitution protects personal privacy, because it relied on “cases from which this Court recoiled after the 1930s, and which had been, I thought, totally discredited.” Progressives would do well to remember how hard it was for civil rights activists in the 1960s to overcome the pro-government precedents established by the New Deal Court.

Everyone disagrees with Supreme Court decisions from time to time. But Americans understand that majorities are not always right, and that our Court plays a crucial role in the system of checks and balances that protects the rights of minorities and individuals who lack political influence. President Obama should recall how Roosevelt’s war on the Court backfired—not only on him, but on the cause of justice in general.

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