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## King Newt takes on the judges

By Roger Pilon

In 1608, King James I announced to the judges of England that because they were merely his delegates, he was entitled to decide cases himself. They responded that no king since the Norman conquest had assumed that power. Lord Coke, chief judge of the Court of Common Pleas, added that "his Majesty was not learned in the laws of his realm, . . . which require long study and experience, before a man can attain to the cognizance of them."

Greatly offended, James said this treasonously placed the king beneath the law. Coke answered: "The king is under no man, yet he is under God and the law, for the law makes the king."



Newt Gingrich, the sometime historian and would-be Republican presidential nominee, would do well to heed Coke's admonition. His "21st-Century Contract with America" launches a frontal assault on the nation's courts, particularly on "judicial supremacy" - the idea that the courts ultimately determine what the law is.

On CBS's *Face the Nation*, Gingrich told Bob Schieffer that as president, he would ignore court rulings he disagreed with (though only rarely, he added). Asked if President Obama could ignore a Supreme Court rejection of Obamacare, Gingrich said he could, but would risk a rebuke by Congress. "Here's the key: It's always two out of three," Gingrich said. "If the president and the Congress say the court is wrong, in the end, the court would lose."

Really? One would be hard-pressed to find that in the Constitution. In fact, when the court finds a law unconstitutional, it's almost always been approved by two branches out of three (the exception being the rare cases when Congress overrides a presidential veto):

Congress passes bills, and the president signs them. According to Gingrich, then, the two political branches could ignore the court almost every time it rules against a law.

The founders' cardinal achievement was the establishment of a popular government under the rule of law, as spelled out in a written Constitution and enforced by an independent judiciary. Our courts haven't always done their job well, but they have been a beacon for other nations struggling to establish independent judiciaries.

Gingrich doesn't stop with ignoring court rulings he believes to be mistaken. As president, he says, he would also urge Congress to strip the courts of jurisdiction, call errant judges on the congressional carpet, impeach them, and even abolish whole circuits - all of which is breathtakingly un-American and also uninformed, but it resonated with many in the audience at the last Republican debate.

That's disturbing, because it reveals a fundamental misunderstanding of our system of government - one exhibited by Gingrich himself. He claims, for example, that since the New Deal, the judiciary's power has "increased exponentially" at the expense of the political branches. Yet Franklin Roosevelt accomplished exactly what Gingrich is calling for: His infamous 1937 threat to "pack" the Supreme Court with additional justices intimidated it into discovering new congressional powers and approving New Deal legislation.

Eventually, the court regained its voice, especially in civil rights decisions like *Brown v. Board of Education* and *Cooper v. Aaron*, the Little Rock school desegregation case in which the justices unanimously found that state officials couldn't "nullify" court rulings - an example of the "judicial supremacy" Gingrich rails against.

The courts' power to declare the law is hardly a recent American invention, as Gingrich seems to believe. It's implicit in a Constitution that vests "the judicial Power" in "one supreme Court." It was discussed expressly and at length in the Federalist Papers. And the court itself secured it in 1803, in *Marbury v. Madison*.

But Gingrich's distortions continue. *Kelo v. New London*, for example, in which the court upheld the eminent-domain transfer of a woman's home to a private developer, was an egregious misinterpretation of the Constitution's takings clause. But far from frustrating popular government, as Gingrich asserts, the court was actually upholding the political branches. And the Jeffersonian Republicans' 1802 abolition of the circuit judgeships created by an outgoing Federalist Congress - the episode on which Gingrich rests so much of his argument - was a brief historical anomaly, not a precedent for abolishing the entire Ninth Circuit Court of Appeals, as he has threatened.

In short, Gingrich is promoting flimflam constitutionalism - and dangerous nonsense besides.