The Washington Post

The Fact Checker

The Truth Behind the Rhetoric | By Glenn Kessler

Obama's selective memory of Supreme Court history

Posted by **Josh Hicks** at 06:02 AM ET, 04/09/2012

(Carolyn Kaster, AP)

"Ultimately, 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 — that an unelected group of people would somehow overturn a duly constituted and passed law. Well, this is a good example. And I'm pretty confident that this Court will recognize that and not take that step."

-- President Obama, discussing the pending U.S. Supreme Court **decision over his health care law, April 2, 2012**

"Let me be very specific. We have not seen a Court overturn a law that was passed by Congress on an economic issue, like health care, that I think most people would clearly consider commerce — a law like that has not been overturned at least since Lochner. Right? So we're going back to the '30s, pre-New Deal.

"And the point I was making is that the Supreme Court is the final say on our Constitution and our laws, and all of us have to respect it, but it's precisely because of that extraordinary power that the Court has traditionally exercised significant restraint and deference to our duly elected legislature, our Congress. And so the burden is on those who would overturn a law like this."

-- Obama, clarifying comments **he made the previous day, April 3**

President Obama made these remarks during a series of high-profile news conferences last week, taking the unusual step of commenting on a Supreme Court case — the challenge to the Affordable Care Act, in this case — while the justices are still deliberating.

It's clear that Obama's "unprecedented" comment was dead wrong, because the Supreme Court's very purpose is to review laws that are passed by the nation's democratically elected Congress — regardless of how popular or well-intentioned those laws may be. This concept of judicial review was established in 1803 with Marbury v. Madison, a case that Obama should have been familiar with as a former law school lecturer and previous president of Harvard Law Review.

Still, we don't know whether the president's factual error was a mere slip-up or a purposeful attempt to mislead, and we generally don't beat people over the head for off-the-cuff remarks. Let's take a look at the president's message in light of his clarifying remarks to see whether it holds up any better under scrutiny.

The Facts

We took the liberty of re-phrasing the president's initial remarks to get at his overarching message. We removed the word "unprecedented," since Obama walked that back, and we inserted the word "economic" before "law," since the president added that distinction in his follow-up. We kept the word "extraordinary" and the part about judicial activism, since Obama never backed away from any of that.

Here's how the original comments would read in light of the president's clarifying remarks:

"Ultimately, I'm confident that the Supreme Court will not take what would be an ~~unprecedented,~~extraordinary step of overturning an [economic] 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 -- that an unelected group of people would somehow overturn a duly constituted and passed law. Well, this is a good example. And I'm pretty confident that this court will recognize that and not take that step."

First, Congress didn't pass the Affordable Care Act with a strong majority. The vote in the House of Representatives, for instance, was 219 to 212, with no Republicans supporting and 34 Democrats opposing the measure.

Second, Obama issued his first set of remarks during a news conference in which he wasn't specifically asked for his thoughts on how the Supreme Court should rule. A reporter simply inquired about how the president would proceed if the health-care law is overturned. The question was: "How would you still guarantee health care to the uninsured and those Americans who've become insured as a result of the law?"

Instead of answering that hypothetical, Obama offered his version of legal history and explained why the statute should be upheld. Critics say he was essentially lecturing the justices.

That said, the Supreme Court hasn't overturned a sweeping law in quite some time. By "sweeping," we mean statutes that apply to virtually all citizens, as the Affordable Care Act does.

Other laws can have major implications without applying to all Americans, so we wouldn't call them sweeping. For instance, an article in Thursday's Washington Post noted that the Supreme Court in 2008 invalidated an act that suspended habeas rights for Guantanamo detainees. This important decision affected only prisoners of war — and Obama actually applauded that ruling.

The Social Security Act and its subsequent Medicare provision serve as good examples of sweeping laws. The Supreme Court affirmed Social Security in two cases in 1937, and the overall Medicare program has not been challenged at the Supreme Court level.

The court affirmed Social Security under Congress's Constitutional power to tax, while the Affordable Care Act deals with something different: the power to regulate commerce. As such, the health law involves an economic issue, just as Obama noted.

Many of the right-leaning legal experts we talked to acknowledged that the modern Supreme Court has largely — but not entirely — shown deference to Congress when it comes to such matters. But some noted that the court has shown no such restraint when deciding whether statutes involve commerce in the first place.

Cully Stimson, a senior legal fellow with the conservative Heritage Foundation, pointed out that the government lost two such cases during the Bill Clinton years. It argued unsuccessfully in U.S. v. Lopez (1995) that possession of a firearm at school constituted economic activity, and in U.S. v. Morrison (2000) that violence against women affected interstate commerce.

Those cases dealt with economic matters, right? Not technically. The Supreme Court determined that the laws didn't involve commerce at all — that's why Congress failed in defending them under the Commerce Clause.

The challenge against the Affordable Care Act is different. It relates to *how* rather than*whether* a law regulates commerce.

We found another case, Printz v. United States (1997), that determined Congress could not force state officials to conduct background checks for firearm sales. This is clearly an economic issue, but the Obama administration argues that it doesn't count because it dealt with federalism as well. The health law's controversial insurance mandate would be enforced at the national level, so it's not a federalist issue.

Legal experts sympathetic to Obama's cause say the president makes a good case with his distinctions.

"To strike down an act that is an economic regulation of this magnitude isn't something we've seen since the Lochner era, and that seems to be what the president was trying to say," said Walter Dellinger, a Duke Law School professor who served as a solicitor general for the Clinton administration.

Critics of the health law say the insurance mandate represents an entirely unique form of economic regulation that potentially warrants a new legal precedent.

In terms of the president's reference to Lochner, he's talking about a case that went to the Supreme Court in 1905, when the justices invalidated a law on how New York regulated worker hours.

Both sides of the political spectrum tend to characterize this ruling as deplorable, as Washington Post reporter Robert Barnes pointed out in a column in Monday's paper. Liberals cite it as an example of the court thwarting progressive legislation, while conservatives call it a case of judicial activism.

Obama correctly noted that the Supreme Court has shown more deference to Congress since the 1930s when it comes to economic legislation, but he said the court has upheld such statutes without exception ever since. This is only true in a very narrow sense.

The two sides in this debate disagree on the parameters for drawing comparisons. Conservatives mention cases such as Morrison, Lopez and Printz. Liberals say those don't really apply.

White House officials argue that this is all a matter of legal opinion and so should not be considered for a fact check. We certainly try not to fact check opinions. But the president stated his opinions as fact, so that's the basis by which we'll judge them.

It's worth noting that the White House keeps changing its tune on how the public should interpret Obama's comments. On Friday, a spokesman told us the president was referring to "major economic legislation." So now we've gone from altogether "unprecedented," to "economic issues" to just "major economic legislation."

It's also interesting that Obama brought up the Lochner case when the White House claims he was making a point about national economic legislation all along. Lochner dealt with a state law, so it seems like an inappropriate reference, at least by the president's own narrow standards. It certainly fit nicely with his narrative about judicial activism.

As for that notion, the president is on shaky ground. Randy Barnett, a constitutional law professor at Georgetown University and a senior legal fellow with libertarian Cato Institute, noted that liberals once accused the Supreme Court of being "activist" for striking down New Deal legislation, and conservatives said the same of the 1973 court that established the right to abortion.

"Judicial activism is just a charge that conservatives and liberals make at each other when they don't like a law being struck down," Barnett said. "It's really vacuous. It's a cheap shot that all politicians love to take because it's easy to level."

The Pinocchio Test

Ordinarily, we would not expect a president to know the intricacies of Supreme Court cases, but we hold Obama to a high standard because he used to teach law and because in his remarks he tossed around references to particular cases ("at least since Lochner").

First of all, the president has a rather distorted view of what constitutes a "strong majority" if he thinks the Affordable Care Act vote makes the cut. Not only was

the victory achieved by a margin of just a few votes in the House, but the supporters were from only one political party—his own.

Second, Obama's remarks implied that the Supreme Court would be acting in extreme fashion by overturning the health-care law. That isn't necessarily true. Some would say that invalidating an economic regulation isn't extraordinary at all.

In fact, the president delivered a sort of factual history lesson on Constitutional law, which he then used as the basis for his argument about judicial overreach. When all was said and done, he had suggested twice that the justices are in danger of becoming the next despicable group of activist judges — like the so-called Lochner court.

On balance, the president earns two Pinocchios—which means creating "a false, misleading impression by playing with words and using legalistic language that means little to ordinary people"—for his comments about the pending Supreme Court decision.

Two Pinocchios

(About our rating scale)