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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Wednesday, April 4, 2012 9:02 PM  
**To:** H  
**Subject:** Fifth Circuit

Last week, as you know, the Supreme Court heard oral arguments in the challenge to the Affordable Care Act. At a press conference on Monday, the President was asked how he would "still guarantee health care to the uninsured" if the Court strikes down the individual mandate. The President responded that he continues to believe the Court will uphold the law, and concluded:

"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." Yesterday, the President responded to another reporter's question by clarifying his remarks:

"And the point I was making is that the Supreme Court [has] 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."

That should have quelled the controversy. But in arguments earlier yesterday in a separate ACA case brought by physician-owned hospitals, Fifth Cir Judge Jerry Smith (a YLS grad appointed by President Reagan in 1987) asked the government's lawyer whether DOJ "recognize[s] that federal courts have the authority in appropriate circumstances to strike federal statutes because of one or more constitutional infirmities." The DOJ attorney replied, "Yes, Of course." But Judge Smith kept pressing and referenced the President's remarks. The DOJ attorney repeated her answer, this time citing *Marbury v. Madison* as establishing judicial review but Judge Smith would not let the issue go, and ultimately requested a three-page, single-spaced letter by Thurs. 5th stating "the position of the Attorney General and the Department of Justice, in regard to the recent statements by the President, stating specifically and in detail in reference to those statements what the authority is of the federal courts in this regard in terms of judicial review." This order required concurrence of at least one other judge on the panel.

I assume that DOJ's response will succinctly acknowledge the authority of the federal courts to strike down statutes, while noting that this is not a power to be used lightly. But ultimately this episode probably raises more questions about Judge Smith and his colleagues than it does about the President's views on constitutional law.