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Newsroom

Goldstein Compares 1936, 2012 Elections

Professor Jared Goldstein argues that President Roosevelt's 1936 re-election campaign illuminates a strategy for President Obama in 2012.

From the BALKINIZATION Blog: "[Why Presidents Cannot Run Against the Court](#)" by Professor Jared Goldstein, Guest Blogger

Saturday, April 14, 2012: With the prospect that the Supreme Court may strike down the Affordable Care Act, many commentators, including Marvin Ammori on this blog, have argued that President Obama should "campaign against the Court." It is not really a plausible campaign strategy.



Contrary to popular conception, Franklin Roosevelt did not campaign against the Court in 1936. Some of his advisers suggested that the reelection campaign should be devoted to challenging the Court's rulings against the New Deal, but Roosevelt agreed with Felix Frankfurter that the administration's disagreement with the Court was too abstract and complicated to be translated into a political campaign, and it would not excite the electorate. In fact, Roosevelt rarely mentioned the Supreme Court or its rulings during the 1936 campaign.

No president can effectively run against the Court because sustained public attention cannot be captured by a fight between the President and the Court. To generate media coverage, a President needs an opponent who will fight back. Of course, the Court is not in a position to engage in public debate of the sort that is typical in our politics. The Court and its members do not make TV ads. They give infrequent speeches and rarely appear on the Sunday talk shows, Fox News, the Daily Show, and Leno. The Court's participation in public debate is limited almost entirely to the issuance of infrequent pronouncements in the usually bloodless language of law. This is not the stuff of a political campaign. President Obama could

speak out against the Court every day, but it will not generate media coverage and public attention if he is the only one doing the talking.



To make a campaign effective, a President needs a real live opponent who will dramatize the conflict for the public and keep the headlines coming by continuing to fight back. Roosevelt was lucky because he had the American Liberty League, a movement launched by the du Ponts and executives of General Motors to argue that the New Deal was an unconstitutional and un-American aberration. A publicity-generating machine, the Liberty League was the perfect foil for Roosevelt. Roosevelt welcomed the opposition by the Liberty League because it gave him a way to present his constitutional philosophy to the American people in the most persuasive way possible. The Liberty League argued that the New Deal was a tyrannical regime that undermined “Americanism” by sacrificing individual rights in favor of “collectivism.” Roosevelt countered that his opponents were “economic royalists” who hid behind patriotic platitudes and constitutional slogans in an effort to deprive the government of power to protect the people from excessive corporate power. Having characterized the Liberty League as a bunch of greedy millionaires, Roosevelt then sought to portray the Republicans and their candidate Alf Landon as mere puppets of the League. It helped that the du Ponts were the biggest donors to the Landon campaign. Roosevelt’s attacks on the Liberty League succeeded in discrediting the organization, and by the end of the campaign, the Republicans begged the League not to do anything to support Landon.

In a sense, the political campaign waged by Roosevelt and the Liberty League was a proxy war for the conflict between the President and the Court, but it translated the language of law into the language of everyday politics, with each side presenting to the public popularized versions of the constitutional

arguments made in court. In court, the two sides argued over the scope of the Commerce Clause and the General Welfare Clause, but the political campaign presented was waged over national character. Big government was sapping the nation of its individualistic spirit, the Liberty League argued; the nation has a duty, Roosevelt argued, to help those in need and to create genuine equal opportunity.

If President Obama wants to replay the 1936 election, he would not run against the Court but against the Tea Party. In important ways, the Tea Party is the successor to the Liberty League. The Tea Party's ideology of constitutional nationalism is identical in every meaningful respect with the Liberty League. Like Roosevelt, Obama could argue that his opponents hide a radical agenda behind constitutional and patriotic slogans. Like Roosevelt, Obama could argue that the Republican nominee is in the pocket of the Tea Party movement. Like Landon, Mitt Romney will find it nearly impossible to distance himself from the Tea Party.

There may well be reasons why this strategy might not work in 2012. For one thing, unlike the Liberty League, which was a top-down organization run by a handful of millionaires, the Tea Party is a genuine grassroots movement with millions of supporters. For another, it may be that the arguments that worked for Roosevelt in 1936 — that aggressive government programs were necessary to protect the people's liberty from the excessive power of big business — will not resonate in 2012. Yet if Obama wants a public fight about the meaning of the Constitution, he has an opponent ready to take this fight to the people.

For full story, click [here](http://balkin.blogspot.com/2012/04/why-presidents-cannot-run-against-court.html). [http://balkin.blogspot.com/2012/04/why-presidents-cannot-run-against-court.html]