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Look who's a judicial activist now

By: Michael Kinsley
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If there is one thing your typical Republican politician does not care for (I have always been given to understand), it is an “activist judge.” You know the sort of judges I mean. The ones who ignore the Constitution and “legislate from the bench,” arrogating to themselves the power that rightly belongs to the American people. In their “Pledge to America,” published shortly b efore the midterm elections and listing the principles by which they intend to govern, Republican congressional leaders made reference to “an overreaching judiciary” and declared: “We pledge to honor the Constitution as constructed by its Framers and honor the original intent of those precepts that have been consistently ignored.”

If there is one more thing your typical Republican politician does not care for, it is frivolous lawsuits that clog the courts and unfairly burden innocent doctors and small-business persons as they go about trying to create jobs. “The rule of law does not mean the rule of lawyers,” the 2008 GOP platform wittily observed.

So it is puzzling to learn that 32 Republican senators have filed a friend-of-the-court brief asking a U.S. District Court judge to i nvalidate President Barack Obama’s health care reform. That’s 32 out of 42 GOP senators, or more than three-fourths, in these waning days of the old Congress. Several of these suits are working their way through the federal court system.

Governors, such as the currently fashionable Tim Pawlenty of Minnesota, have also filed a brief, as have 63 Republican House members. John Boehner, the next speaker, feeling the full weight of his upcoming office, has filed one all by himself.

The pledge complains that “an arrogant

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and out-of-touch government of self-appointed elites makes decisions ... without accepting or requesting the input of the many." But health care reform was enacted by majorities in both houses of Congress and signed into law by a president who got a majority of the people' s votes, so I don't know who these "self-appointed elites" are.

Republicans have said they will try to repeal Obamacare as soon as they are able. They are boiling over with eagerness to get rid of Obama himself. They are welcome to try — and may succeed. They have done quite well in turning the Senate's filibuster tradition into a virtual 60-vote requirement for passing most legislation and are now pushing to make that a 61-, or maybe 63- or 64-, vote requirement by suggesting that important legislation is illegitimate if it just squeaks through. This legislative entrepreneurialism is a strange way of honoring the original intent of the Framers. Asking unelected judges to overturn the most important new law of the president's term is even stranger and hard to square with all the sermonizing about an out-of-control judiciary.

Notice, if you will, that the shower of abuse poured on judges in the GOP pledge ("striking down long-standing laws and i nstitutions, and scorning the deepest beliefs of the American people," and so on) is missing any explicit condemnation of "judicial activism." This may be an oversight, or it may reflect a dawning realization that you can make judicial activism work for you. In other words, a "conservative" judiciary isn't one that honors original intent, practices "strict constructionism," follows precedent, etc. It's one that imposes the conservative agenda.

But even a judiciary so inclined would be unlikely to buy the constitutional case against Obamacare. In a nutshell, the argument is over a rule that, when it takes

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effect in a couple of years, will require almost everyone to carry health insurance. If people don't get it at work, they will have to buy it (with government help); and if they don't buy it, they will pay a stiff fine. The Republicans contend that this rule has no basis in any constitutional provision.

This does not start out as a trivial argument, although it gets trivial pretty quickly. The U.S. is supposed to be a government of limited powers. Everything Washington does is supposed to be grounded in some constitutional provision. Ever since the Depression, the provision of choice has almost always been the commerce clause. And judges have almost always found the commerce clause sufficient to uphold any use of federal power — even the Civil Rights Act and even a law regulating food grown and consumed at home with no money changing hands. Both have been ruled constitutional because the Constitution authorizes the federal government "to regulate commerce."

It didn't have to be this way. Judges might have taken a far more restrictive view. They might have tossed out any number of federal government activities (minimum wage? Securities and Exchange Commission? food stamps?). But they didn' t, and the public has grown fond of many of the government activities (Medicare? Social Security? farm subsidies?). It's not easy to distinguish health care reform from other activities and determine somehow that it alone is not supported by the commerce clause. The attempt to do this has led down some odd, entertaining byways.

For example, there is that mandatory-insurance provision. If you don't have insurance, you pay a fine. Republicans insist that this isn't about having insurance — it's about not having insurance. And while the commerce clause might cover an "activity" like buying insurance, it doesn't

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cover an “inactivity” like not buying insurance.

Then there is the question of whether forcing you to buy insurance and fining you if you don’t amounts to a “tax.” Ordinarily, Republicans are delighted to label almost any government imposition as a tax. But in this case, that’s a trap, because the Constitution gives the federal government the power to tax. So Republicans insist that the Obamacare provision is not a tax. Nothing like a tax, your honor. No similarity whatsoever. So what is it, then? It’s a “civil regulation with a civil fine for noncompliance.” Oh.

And so on. Exactly the kind of prissy parsing that conservatives usually have contempt for.

Boehner and company had better be wary. When the people at the Landmark Legal Foundation or the Cato Institute or the deceptively named American Civil Rights Union say they want to see government shrunk back to its 18th- or 19th-century functions, they mean it. When Republican politicians echo these themes, they don’t mean it. They just want to kill Obamacare and then return to their denunciations of activist judges.

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