Forbes

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5/28/2012 @ 10:46AM

Constitutional Death For Obamacare? The Left Threatens John Roberts And The Supreme Court

The Constitution created a national government of limited, enumerated powers. Over the years the Supreme Court dismantled many of the original barriers to expansive government. Now the President and the left-wing legal establishment are lobbying the Court to ratify the unprecedented power grab known as Obamacare.

America's health care system is a mess. However, there were better options than a federal takeover through the misnamed Patient Protection and Affordable Care Act. Which is why a majority of Americans continue to oppose the law and support its repeal.

Moreover, Obamacare exceeded the federal government's authority. States have what is known as "police power," which allows them to regulate widely—such as requiring residents to purchase auto insurance. However, the national government has no such authority. Congress may act only on an explicit grant of power under Article 1, Section 8.

No provision authorizes Washington to dictate that Americans purchase a private product like health insurance. If the federal government can do that, it can do anything—that is, act like a state with "police power." Hence Washington could force Americans to buy General Motors autos, Lehman Brothers securities, or a new home to boost the economy. Or, to use the famous hypothetical, force Americans to eat broccoli to reduce health care

costs. In more than two centuries Congress has never claimed to possess such authority.

Admittedly, the idea of constitutional limits is not fashionable in Washington. The regulation of "interstate commerce" has become the all-purpose justification for almost everything Congress does. Interstate commerce once really meant interstate commerce. Now it means anything that vaguely sort of indirectly affects interstate commerce. Indeed, defenders of Obamacare argued that Uncle Sam can regulate individuals who have not acted, but simply engaged in "mental activity" by choosing not to enter interstate commerce, as one district court judge put it. It is an extraordinary claim.

Members of Congress rarely ask whether they have authority to act. When Obamacare was passed, House Speaker Nancy Pelosi seemed shocked by the question, responding "are you kidding?" Majority Whip James Clyburn (D-SC) acknowledged that "There's nothing in the Constitution that says that the federal government has anything to do with most of the stuff we do." Rep. Phil Hare (D-Ill.) told constituents: "I don't worry about the Constitution." Nevertheless, the Left was confident, since the Court had rarely blocked new assertions of federal power. However, when even swing Justice Anthony Kennedy expressed doubt about the measure's lawfulness during oral arguments in March, President Obama and his followers panicked.

The president warned that "an unelected group of people would somehow overturn a duly constituted and passed law," that such a decision "would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress." Yet the courts routinely void, often *to liberal applause*, duly enacted laws, including those banning sodomy, outlawing abortion, and mandating segregation, for instance. Indeed, Sen.Barack Obama advocated appointment of those who would uphold "the Court's historic role as a check on the majoritarian impulses of the executive branch and the legislative branch."

Sen. Chuck Schumer (D-NY) claimed that "Should the Supreme Court overturn this law, it would be so far out of the mainstream that the court would be the most activist in a century." He apparently forgot decades of left-wing activism, stretching from the New Deal to the Great Society. A passel of leftish legal commentators also expressed shock, shock that conservative

justices might not exercise "restraint." Columbia's Patricia Williams even argued that the Court's very grant of certiori, or decision to take the case, was "an astonishing display of judicial activism."

Since the New Deal the legal game played by the Left is simple. Use the activist judiciary to engage in social engineering. Then lecture more conservative justices to ratify these activist splurges in the name of judicial "restraint." Government would only expand, never shrink.

Observed Michael McConnell, a Stanford law professor and former federal judge: "It appears the [liberal law] professors' idea of sound jurisprudence is that their favored justices are free to invalidate statutes that offend their sensibilities whether or not the words of the Constitution have anything to say on the matter .... But if conservative justices have the temerity to enforce actual limits on government power stated in Article 1, Section 8—over liberal dissents—then they are acting as shameless partisans." This position fits the old adage, heads I win, tails you lose.

The real issue is not activism versus restraint, but fidelity to the Constitution. Enforcing limits on government often require judges to act. As in the case of Obamacare.

Without the lodestar of the original meaning, there is no real interpretation. Jurisprudence becomes little more than sophisticated rationalization for whatever position the jurist holds. It is the rule of men rather than the rule of law.

Of course, one can argue about the original meaning of any text. What matters most is the general understanding of those who wrote, proposed, and ratified a particular constitutional provision. If what they intended by their actions do not matter, then why bother even drafting a constitution or passing a law? It will all be made up anyway. The world changes, and so must the constitution, but that is why it provides a means of amendment. The Supreme Court should not act as a continuing constitutional convention.

If the justices followed their usual procedure the Obamacare case was decided in conference the Friday after oral arguments. The initial leftish criticism could be viewed as frustration at the realization that a majority of justices might still take constitutional limits on government seriously. However, the

campaign of intimidation has continued—mostly directed at Chief Justice John Roberts. So-called progressives "are waging an embarrassingly obvious campaign, hoping he will buckle beneath the pressure of their disapproval and declare Obamacare constitutional," observed columnist George Will.

A couple weeks ago Senate Judiciary Committee Chairman Patrick Leahy urged the Supreme Court to "do the right thing" and blasted the body's conservative members. From the Senate floor he addressed Roberts: "I trust that he will be a chief justice for all of us and that he has a strong institutional sense of the proper role of the judicial branch." Which, of course, in Leahy's view means voting to uphold Obamacare.

Jeffrey Rosen of the *New Republic* made a similar pitch: "Of course, if the Roberts Court strikes down health care reform by a 5-4 vote, then the chief justice's stated goal of presiding over a less divisive court will be viewed as an irredeemable failure. But, by voting to strike down Obamacare, Roberts would also be abandoning the association of legal conservatism with restraint—and resurrecting the pre-New Deal era of economic judicial activism with a vengeance."

Such special left-wing pleading cannot be taken seriously. Sen. Leahy whined about "how dismissive [the justices] were of the months of work in hearings and committee actions," which weren't at issue, after his legislative colleagues failed consider the measure's constitutional implications. Contra Mr. Rosen, who is not known as an advocate of judicial restraint, the Court has a responsibility to void legislation, even if widely supported by liberals, which fails to comport with the Constitution. Striking down this unprecedented measure would not—unfortunately, in my view—call into question many other dubious laws.

These attacks appear to be an attempt to change a decision already made. The outcome of the Court's deliberations will not be known until it releases its decision next month, but the Left obviously fears that it has lost. It apparently believes that its only hope is to browbeat justices into a legal flip-flop.

It brings to mind the New Deal era, when the Supreme Court retreated from its defense of economic liberty. President Franklin D. Roosevelt, angry with the Court for voiding some of his initiatives, proposed to "pack" the court with new justices. The scheme died in Congress, but only after one justice, Owen

Roberts, famously changed positions, called "the switch in time that saved nine." As my friend Georgetown Law Professor Randy Barnett pointed out, recent scholarship suggests that Roberts shifted before Roosevelt proposed his scheme. However, the justice's reputation has been permanently tainted: "Fairly or not, Justice Owen Roberts will likely forever be known as the justice who succumbed to political pressure to change his vote," observed Barnett.

The Court has a much easier time with Obamacare today, since the public opposes the president and supports judicial action. Not only do people want Congress to repeal the law; they want the Supreme Court to void the measure. The point is not that the justices should sacrifice justice to represent the popular will. But in this case they can uphold both. Standing on constitutional principle will not risk the Court's independent standing.

While the president and others grandly talk about the conservative justices respecting the role of the Supreme Court, they are the ones threatening to discredit the Court. If a majority now votes to uphold the law, it will raise suspicion that one or more members yielded to outside intimidation. The truth won't matter, as with the case of Owen Roberts. And it will not just be the reputation of one or another justice that will suffer. The Court's image, too, will be tainted.

Much is at stake in the forthcoming Supreme Court decision. Not only the future of one piece of seriously flawed legislation. But whether any effective constitutional limits remain on the national government. Should the Court uphold the act, it will have completed a radical transformation of the relationship of Americans and their national government. In the *Lopez* case Justice Kennedy cited the "federal balance" which is, he argued, "too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of government has tipped the scale too far."

We should hope, along with George Will, that "clumsy attempts to bend the chief justice are apt to reveal his spine of steel." He and the other justices should stand firm despite the Left's play at pressure politics. America's future as a democratic republic, guaranteeing individual liberty and operating under a rule of law, depends on it.