

Legal experts debunk conservative media's claim that health reform proposals are unconstitutional

October 30, 2009 10:07 pm ET

SUMMARY: Conservative media outlets including *The Washington Times* and Fox News have pushed the claim that health care reform proposals under consideration by Congress are unconstitutional. However, legal scholars -- including one who recently served as a special counsel to Sen. John Cornyn (R-TX) during Supreme Court Justice Sonia Sotomayor's confirmation proceedings -- have pointed out the flaws in conservatives' arguments, including the facts that regulation of the health care sector falls under Congress' broad power to regulate interstate commerce and that Congress has repeatedly passed laws regulating health care and health insurance.

Conservative media advance claim that health care reform is unconstitutional

Fox News' senior judicial analyst Andrew Napolitano: Reform proposal is an "unconstitutional" "raw abuse of power." In a *Wall Street Journal* op-ed, Napolitano -- a former New Jersey Superior Court judge -- wrote:

The Supreme Court finally came to its senses when it invalidated a congressional ban on illegal guns within 1,000 feet of public schools. In *United States v. Lopez* (1995), the Court ruled that the Commerce Clause may only be used by Congress to regulate human activity that is truly commercial at its core and that has not traditionally been regulated by the states. The movement of illegal guns from one state to another, the Court ruled, was criminal and not commercial at its core, and school safety has historically been a state function.

Applying these principles to President Barack Obama's health-care proposal, it's clear that his plan is unconstitutional at its core. The practice of medicine consists of the delivery of intimate services to the human body. In almost all instances, the delivery of medical services occurs in one place and does not move across interstate lines. One goes to a physician not to engage in commercial activity, as the Framers of the Constitution understood, but to improve one's health. And the practice of medicine, much like public school safety, has been regulated by states for the past century.

[...]

What we have here is raw abuse of power by the federal government for political purposes. [9/15/09]

O'Reilly dismisses legal argument as "B.S.," declares reform bill "unconstitutional." On his Fox News show, Bill O'Reilly interrupted a statement by Fox News contributor Lis Wiehl explaining why Congress has the power to pass health care reform legislation under the Commerce Clause of the Constitution and stated: "I want the audience to know, this is total B.S. This is why people hate lawyers. This is nuts." O'Reilly then said that a requirement to buy health insurance is "unconstitutional." Later in the discussion, when Fox News host Megyn Kelly brought up the Commerce Clause again, O'Reilly again interrupted, saying: "All right. I don't want to hear it. You're giving me a headache. I'm going to go on record as saying now: This is unconstitutional." [8/25/09]

Townhall columnist: Mandate that individuals purchase health insurance "would be glaringly unconstitutional."

Townhall columnist Ken Klukowski, also a fellow and senior legal analyst at the American Civil Rights Union, wrote a piece for *Politico* stating: "The Senate Finance Committee-passed health care bill includes an 'individual mandate' that Americans must buy an insurance policy or pay a fine, an approach that tracks President Barack Obama's health care proposals. But if enacted into law, this mandate would be glaringly unconstitutional." Klukowski dismissed the Commerce Clause argument, stating: "The Commerce Clause still constrains federal action, even though in the past seven decades only two laws have been struck down on Commerce Clause grounds, in 1995 and 2000. We don't see the courts use this provision often because even on its worst day, Congress usually doesn't go on an insane, socialist spending spree. (Well, until lately.)" [10/20/09]

Wash. Times: "Constitutionality of health overhaul questioned." In an October 28 article, *Washington Times* chief political correspondent Donald Lambro wrote an article headlined "Constitutionality of health overhaul questioned."

Lambro wrote: "On top of all the other obstacles facing President Obama in his quest to pass health reform is this one: Does the U.S. Constitution allow the government to require uninsured Americans to buy medical insurance or impose a tax penalty if they refuse?" Lambro cited six attorneys or law professors affiliated with the conservative Federalist Society or libertarian Cato Institute arguing that the proposal is unconstitutional. Lambro cited two law professors defending the constitutionality of the proposal. [10/28/09]

Fox News' Jarrett advances claim that health care bill is unconstitutional. On the October 25 edition of Fox News' *America's News HQ*, host Gregg Jarrett asked Rep. Rob Andrews (D-NJ): "As you know, Congress -- and you're a lawyer -- Congress has authority in the Constitution to levy taxes, to regulate interstate commerce. Where in Article 1, Section 8 or, in fact, anywhere in the Constitution, is the federal government given the power to regulate people simply because they exist? Because that's what the Senate version would do." When Andrews stated that the Commerce Clause does indeed give Congress the power to regulate health care, Jarrett cited a *Washington Post* **op-ed** by two attorneys who served in the Justice Department under Presidents Reagan and George H.W. Bush arguing that an individual mandate would be unconstitutional:

JARRETT: Well, in fact, constitutional scholars recently --

ANDREWS: Well, you know, Medicare -- well, one of them has. But you know, Gregg --

JARRETT: No, no, two of them have. And you read it.

[...]

JARRETT: You know what I'm talking about. Their op-ed piece in *The Washington Post*. And what they said is --

ANDREWS: Can we -- can we have a little fair and balanced here for just a second?

JARRETT: This is unconstitutional. You can't require people to do that. Driving a car is different.

ANDREWS: OK. Can we have a little -- just, just, just --

JARRETT: That's a voluntary activity that can be regulated by states.

ANDREWS: Can we have just a minute of fair and balanced, just as an exception here. That Medicare was challenged on the same basis, and it withstood constitutional challenge, Gregg. I think this will too.

[10/25/09]

Legal scholars debunk claim that reform bill is unconstitutional

Law professor Kerr, who advised Cornyn, declares Napolitano's argument "weak" and "filled with so many errors." George Washington University law professor Orin Kerr, who served as **Cornyn's special counsel** for the Sotomayor confirmation proceedings, wrote a blog post stating: "Once in a while I come across an op-ed filled with so many errors, misstatements, and plainly weak claims that the mere number of those becomes far more interesting than the argument of the op-ed itself. A case in point is **today's Wall Street Journal op-ed by Fox News Channel senior judicial analyst Andrew P. Napolitano**, which argues that President Obama's health care proposals are unconstitutional because they exceed the commerce clause power. Here's an excerpt; how many errors, misstatements, and plainly weak claims can you count?" After quoting two paragraphs from Napolitano's piece, Kerr stated: "There are also errors by omission, like the curious decision to ignore **Gonzales v. Raich**, but I think it's only sporting to stick to claims actually made." [10/17/09]

Constitutional expert Chemerinsky: Constitutionality of reform proposals supported by "unbroken line of precedents stretching back 70 years." In an October 23 *Politico* piece responding to Klukowski, University of California, Irvine law professor Erwin Chemerinsky stated, "Under an unbroken line of precedents stretching back 70 years, Congress has the power to regulate activities that, taken cumulatively, have a substantial effect on interstate commerce." Chemerinsky further stated:

Those opposing health care reform are increasingly relying on an argument that has no legal merit: that the health care reform legislation would be unconstitutional. There is, of course, much to debate about how to best reform America's health care system. But there is no doubt that bills passed by House and Senate committees are constitutional.

Some who object to the health care proposals claim that they are beyond the scope of congressional powers. Specifically, they argue that Congress lacks the authority to compel people to purchase health insurance or pay a tax or a fine.

Congress clearly could do this under its power pursuant to Article I, Section 8 of the Constitution to regulate commerce among the states. The Supreme Court has held that this includes authority to regulate activities that have a substantial effect on interstate commerce. In the area of economic activities, "substantial effect" can be found based on the cumulative impact of the activity across the country. For example, a few years ago, the Supreme Court held that Congress could use its commerce clause authority to prohibit individuals from cultivating and possessing small amounts of marijuana for personal medicinal use because marijuana is bought and sold in interstate commerce. [10/23/09]

Yale Law professor Amar debunks arguments that reform is a "taking." According to Slate.com's Timothy Noah, Yale law professor Akhil Reed Amar and Fordham Law School dean William Treanor **debunked** conservatives' argument that the individual mandate could be considered a "taking" in violation of the Fifth Amendment:

[A]ccording to Akhil Reed Amar, who teaches constitutional law at Yale, the case law does not support [Peter] Urbanowicz and [Dennis] Smith [both formerly of the Department of Health and Human Services]. "A taking is paradigmatically singling out an *individual*," Amar explains. The individual mandate (despite its name) applies to everybody. Also, "takings are paradigmatically about real property. They're about *things*." The individual mandate requires citizens to fork over not their houses or their automobiles but their money.

Finally, Amar points out, the individual mandate does not result in the state taking something without providing compensation. The health insurance that citizens must purchase *is* compensation. In exchange for paying a premium, the insurer pledges (at least in theory) to pay some or all doctor and hospital bills should the need arise for medical treatment. The individual mandate isn't a *taking*, Amar argues. It's a *tax*.

But how can it be a tax if the money is turned over not to the government but to a private insurance company? William Treanor, dean of Fordham Law School and an expert on takings, repeated much of Amar's analysis to me (like Amar, he thinks a takings-based argument would never get anywhere), but instead of a tax he compared the individual mandate to the federal law mandating a minimum wage. Congress passes a law that says employers need to pay a certain minimum amount not to the government but to any person they hire. "The beneficiaries of that are private actors," Treanor explained. But it's allowed under the commerce clause. "Minimum wage law is constitutional." So, too, then, is the individual mandate.

Yale Law professor Balkin debunks claim that Tenth Amendment prohibits reform. Responding to the arguments that health care reform violates the Tenth Amendment -- which reserves all power not delegated to the federal government to the states or the people -- Yale law professor Jack Balkin has **noted** that "the safeguards of federalism are *political*," not judicial, and that state governors **do not have the power** to nullify federal laws or "violate federal laws or interfere with federal employees."

&mdash A.H.S.

Copyright © 2009 Media Matters for America. All rights reserved.