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THE HILL'S Congress Blog

Where lawmakers come to blog

The Big Question: Is the healthcare lawsuit a legal issue or a stunt?

By Sydelle Moore - 03/24/10 11:13 AM ET

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Some of the nation's top political commentators, legislators and intellectuals offer insight into the biggest question burning up the blogosphere today.

Today's question:

Thirteen state attorneys general have filled a lawsuit claiming that the new healthcare reforms are unconstitutional. Is this a real legal challenge or a political stunt?

Ilya Shapiro, Cato Senior Fellow in Constitutional Studies and Editor-in-Chief, Cato Supreme Court Review, said:

The challenge is very real—and necessary—but we are in uncharted territory here so it's difficult to predict how courts will react.

The strongest and most important legal argument attacks the constitutionality of the individual mandate to buy a certain approved health insurance plan. Never before has the federal government—or any other—tried to force Americans to buy a particular good or service. Never before has it said that every man, woman, and child alive has to purchase a particular product, on penalty of civil or criminal sanction or forfeiture. And never before have courts had to consider such a breathtaking assertion of raw power -- not even during the height of the New Deal, when the Supreme Court ratified Congress' regulation of what people grew in their backyards on the awkward theory that such behavior affected interstate commerce.

The individual health care mandate is an even greater expansion of congressional power under the Commerce Clause. And it cannot be justified under the Necessary and Proper or General Welfare Clauses either, because these provisions guide the exercise of Congress' enumerated powers without adding to them. In short, if the challenges to this health care "reform" fail, nobody will ever be able to claim plausibly that the Constitution limits federal power.

Hal Lewis, professor at UC Santa Barbara, said:

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Asking non-lawyers about constitutional law is like asking Nancy Pelosi about science. Having said that, I think the challenges are real enough, but the Supreme Court has been willing over the years to bend the Constitution when appropriate, so that in today's coercive atmosphere anything is possible. The members of the Court are human too.

I don't know if it will happen on this issue, but somewhere down the road there lies a real conflict between the Obama Administration and the Court. I am old enough to remember when President Roosevelt had a similar problem, and his solution was to try to pack the Court. He failed, but as Yogi Berra is alleged to have said, it is hard to predict the future. There are plenty of countries with tame Supreme Courts.

Joe Madison, host of The Black Eagle radio show, said:

The "Right" need to give up the ghost. This stunt is reminiscent of those who opposed the 1964 Civil Rights legislation. Their legal stunts failed and they will fail again. Once the American people realize this health care reform law will benefit them, they will be voting any State Attorneys who even consider taking away their medical benefits.

John F. McManus, president of The John Birch Society, said:

The Attorneys General lawsuit is a justifiable legal challenge that might have a chance to cancel the monstrous healthcare intrusion if there were enough Americans who understood the Constitution and the proper role of government. Sadly, the schools have done a masterful job of making the topic of American history so boring and so arcane for several generations of Americans that the numbers who understand true Americanism are few.

There is, however, a stirring throughout the land today that is looking into and attempting to understand the Constitution. Anyone who cares about liberty will do well to spur the awakening on, or at least join in the growing awareness. The time for reversing our nation's plunge into totalitarian government is fleeting.

Ian Millhiser, Policy Analyst at the Center for American Progress, said:

Of course this is just a political stunt. Even ultra-conservative Justice Scalia said, in *Gonzales v. Raich*, that the Constitution gives Congress sweeping authority to regulate "economic activity" --and it is laughable to claim that a bill to regulate the national health insurance market doesn't regulate economic activity. The question Americans should be asking is why, at a time when many states are being forced to lay off teachers to make ends meet, over a dozen state attorneys general are about to waste millions of taxpayer dollars to litigate a frivolous lawsuit.

Justin Raimondo, editorial director of Antiwar.com, said:

A great deal if not most of the legislation passed since the New Deal has been and remains unconstitutional -- e.g., where in the Constitution does it say the government has the "right" to impose the forced savings called "Social Security"? -- but that hasn't stopped anyone. The Constitution is an archaic parchment trotted out on special occasions for ritualistic purposes, and then put back under glass and steadfastly ignored. Where in the Constitution does the President have the power to send tens of thousands of troops overseas in an undeclared war -- and doesn't that document say only Congress has the power

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to make war? Again, the Constitution is politely but firmly ignored.

So the answer to the question is: yes, healthcare "reform" making the purchase of insurance mandatory is indeed unconstitutional. The problem is that nobody cares about the Constitution -- and if they started caring now, at this late date, they'd have to repeal most of the "social" legislation of the past seventy years.

Frank Askin, professor of law at Rutgers University, said:

I would call it a political stunt. They are confusing their policy preferences and constitutional law. While I would be the last one to provide assurances as to what the right-wing Supreme Court majority might do (I was certain the court would never stop the counting of Florida ballots and the appoint George W. Bush president in 2000), there is no support in constitutional law or history for the challenges to the healthcare legislation.

Bill Press, host of the "Bill Press Show" and a contributor to The Hill Pundits Blog, said:

Please, get serious. This is nothing but an attempt by publicity-hungry Republican attorneys general, all of whom are planning on or already running for higher office, to get their mugs on national television.

Alan Abramowitz, professor of political science at Emory University, said:

In my opinion it is clearly more of a political stunt. There is little or no chance that the courts will rule the healthcare reform law unconstitutional. I believe that all of these state AGs are Republicans and that several of them are either running for reelection or for governor. These lawsuits are a good way of building support among conservative primary voters and donors, although they carry some risk of alienating voters who stand to benefit from provisions such as allowing coverage of children up to age 26, prescription aid to seniors in the donut hole, and barring exclusion of children with preexisting medical conditions from coverage.

John Feehery, The Hill Pundits Blog contributor, said:

If it is a political stunt, it is a risky one. I am not a constitutional scholar, but it seems that there are some legitimate issues being raised here, especially the idea that the federal government can force you to buy a product from a private-sector company. What's next? A mandate to eat at least five servings of broccoli a week? But if this is seen as merely as a political exercise, I don't think the voters will react particularly well to it.

Peter Fenn, Democratic strategist, said:

Big-time political stunt — have any of these folks ever taken a constitutional law class?

Comments (42)

I am amazed at how any one who is opposed to this bill is continuously negated by those who are for it. NO, IT IS NOT A POLITICAL STUNT!!! I as an American citizen want to see this bill challenged all the way up to the Supreme Court. LET THE COURT DECIDE.

BY **MEANNIE52** on 03/24/2010 at 12:20

I don't consider it a political stunt. I consider the bill unconstitutional. The supreme court has already ruled on this. 1935: Railroad Retirement Board v. Alton Railroad

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Company, 295 U.S.330. The Supreme Court ruled that Congress that it has no constitutional authority whatsoever to legislate for the social welfare of the worker. The result was that when Social Security was instituted, it had to be treated as strictly voluntary. "The catalog of means and actions which might be imposed upon an employer in any business, tending to the comfort and satisfaction of his employees, seems endless. Provisions for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power."

BY **ACCOUNTANT** on 03/24/2010 at 12:26

I'm with Meannie52. If over a dozen states have empowered (and presumably funded) their AGs to sue, I would hope the courts would have the decency to hear this case. There doesn't seem to be a precedent either.

BY **AWESOME C** on 03/24/2010 at 12:37

Can you possibly be more biased in your choice of so-called "nation's top political commentators, legislators and intellectuals"?

BY **TIM** on 03/24/2010 at 12:40

IT IS A FUND RAISING STUNT! WASTE TAXPAYERS DOLLARS ON A FEEL GOOD BUT HOPELESS CAUSE- GO AHEAD! IT WILL BE ANOTHER UGLY LOSS FOR REPUBLICANS.

BY **NINA** on 03/24/2010 at 12:52

Now ask that same question to Mark Levin. You have just demeaned the 10th Amendment. We common folks live out here do have STATE RIGHTS. I will NOT let some lefty professor tell us what we should be doing. It was stupid to think we would that this laying down. This ain't over!!!!

BY **LOADMASTER** on 03/24/2010 at 12:53

So Millhiser believes that the Constitution gives Congress sweeping authority to regulate "economic activity." Gosh, all this time I thought I was an American citizen with unalienable rights, now I find out that I am just part of "economic activity." You go, Attorneys Generals, you are fighting for the rights of American citizens and we stand with you.

BY **THUNDERSTORM** on 03/24/2010 at 12:57

There was already one war fought over state's rights, there may be another. I understand that the liberal left thinks they know what's best for everyone. And I understand that they think we in the "flyover states" just need to make stuff and pay taxes so they can redistribute the fruits of our labor. But I can also see what lay further down this slippery slope we have started down. As medical costs continue to rise - the bill really doesn't address any of the real cost issues - the liberals will search for more power over the cost of healthcare. Get ready folks - they will outlaw anything they deem unhealthy, be it types of food or activity. Prohibition, here we come...again.

BY **JIMMY KNUCKLES** on 03/24/2010 at 13:28

The new bill requires all citizens to buy a form of health insurance, therefore I am required to participate in "economic activity". Congress may have the authority to regulate economic activity, but it does not have the authority to force people into economic activities. Many presume people will participate in buying health care, but younger adults who are mostly healthy see the costs outweighing the benefits, and do not buy insurance. If I am not buying insurance (therefore no economic activity), Congress has no authority to regulate me! If someone disagrees, please provide where the constitution contradicts what I have said. Thanks! P.S. I find it funny that the article states they have "Some of the nation's top political commentators, legislators and intellectuals". Proud to say that most "average joe's" are more informed than this elitist class is!

BY **CHRIS** on 03/24/2010 at 13:44

I say this lawsuit is worth every single taxpayer dollar!

BY **MARK IN CA.** on 03/24/2010 at 13:59

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