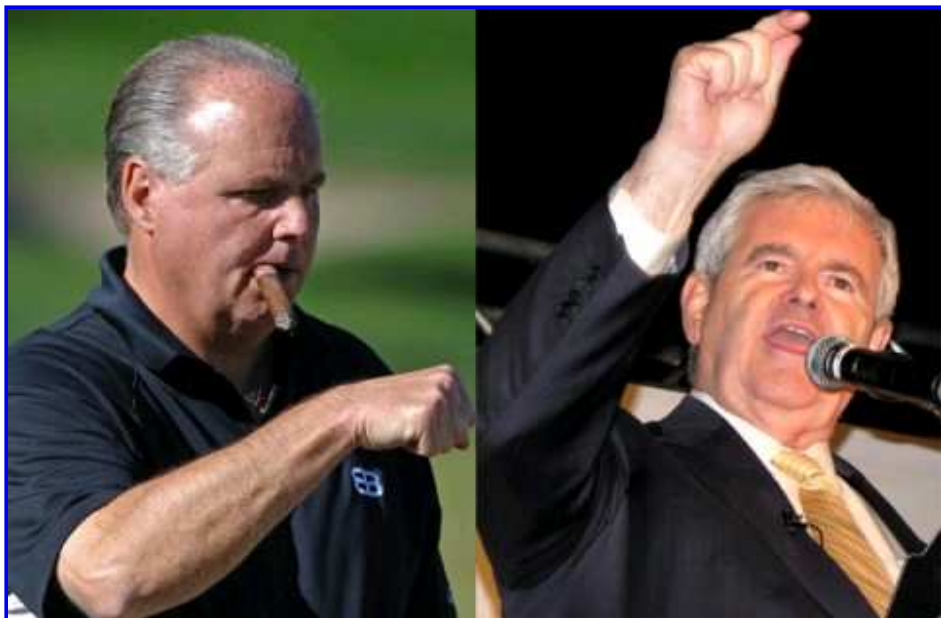


GOP's 'Repeal Health Care' Plan Faces High Hurdles

Conservatives Look to Courts as Best Hope

  By [David Weigel](#) 12/29/09 6:00 AM



Rush Limbaugh and Newt Gingrich (Cal Sport Media/ZUMA Press; Flickr)

As soon as the Senate passed the Patient Protection and Affordable Care Act on Dec. 24, Republicans and conservative activists started making a promise to voters. Give them a victory in the 2010 midterm elections, and they'll repeal the bill.

“Every Republican in 2010 and 2012 will run on an absolute pledge to repeal this bill,” [said Newt Gingrich](#), the former speaker of the House who remains a key strategic thinker for the party, on the Dec. 27 episode of “Meet the Press.”

“This has an unusual ability to be repealed, and the public is on that side,” [said Max Pappas](#), the vice president of public policy at FreedomWorks, in a Dec. 28 interview with Avi Zenilman. “The Republicans are going to have to prove that they are worthy of their votes.”



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The “repeal” pledge wasn’t anything new for the GOP. In August, Rep. Joe Barton (R-Texas) [promised that](#) passage of health care reform would put Republicans back in charge on Capitol Hill in 2011 and put him in a position to repeal the bill. In September, Rep. Michele Bachmann (R-Minn.) [told conservative activists](#) that a Republican Congress would “pass repealer bill after repealer bill” undoing the work of President Obama and the Democrats, with health care reform first in their sights.

But as Republicans gravitate towards a repeal message for the 2010 elections, they’re running up against the reality that health care reform would be prohibitively hard to roll back. According to conservative health care analysts, legal analysts, and political strategists, if President Obama signs health care reform into law, Republicans will have extremely limited opportunities to repeal any part of it.

“Anyone who thinks they’ll be able to repeal ObamaCare is kidding themselves,” said Michael Cannon, director of health policy studies at the libertarian Cato Institute. “If they want to stop it, they need to stop it now.”

In conversations with TWI, conservatives identified a few hurdles for a hypothetical, repeal-minded GOP Congress. The first is that in their most optimistic scenario, in which Republicans like Barton and Bachmann hold committee chairmanships, Barack Obama will be president, wielding a veto pen, until at least January of 2013. The second hurdle — one that Republicans aren’t considering, but Democrats are — is that once it passes, health care reform will win back public support. And the third hurdle is a provision of the bill that, according to Sen. Jim DeMint (R-S.C.) and other conservatives, may not ever be subject to new legislative oversight. The road ahead for repeal looks so daunting that many conservatives are looking at legal challenges, not GOP wins, as the most promising way to challenge health care reform.

Edmund Haislmaier, senior fellow in health policy studies at the conservative Heritage Foundation, was more optimistic than some about Republicans’ chances of repealing the bill, and said that candidates would be shrewd to run in 2010 promising as much. “Still, there’s always a danger of entrenchment,” Haislmaier told TWI. “Believe me, I’d rather have the thing not pass.”

Still, Democrats, in public and in private conversations with TWI, have been more specific about what parts of the bill they’ll campaign on than Republicans have been about what parts they’ll campaign against. In a Dec. 24 press release attacking Sen. Richard Burr (R-N.C.), one of the few Republican senators viewed as potentially vulnerable in 2010, the Democratic Senatorial Campaign Committee charged that Burr “will have to look North Carolinians in the eye and pledge to repeal health care reform which will have afforded coverage to 1.7 million North Carolinians, brought down costs for families and small businesses, ended appalling insurance practices, and lowered the deficit.”

Republicans, while talking generally about repeal, have not beaten back Democratic arguments about the most popular aspects of the bill — health insurance exchanges, a ban on denying insurance for pre-existing conditions, and filling the so-called “doughnut hole” gap in Medicare Part D funding. Much of their criticism focuses on the idea of a “government takeover” and on health care mandates that would not come into effect until 2013 or 2014. In a Dec. 27 interview on “This Week,” Sen. Mitch McConnell (R-Ky.) [called the bill](#) a “big problem” for Democrats and claimed that “the surveys indicate the American people are overwhelmingly opposed to this effort to have the government take over all of their health care.” According to Democratic strategists, McConnell’s failure to get more specific, or to out-and-out

promise that his party will repeal the bill, revealed that the party is not fully behind a “repeal” message.

“You attack the expansion of government,” said Ret. Lt. Col. Allen West, a Republican candidate for Congress in Florida whom the National Republican Congressional Committee [views as](#) one of its strongest challengers. “Improving and reforming our health care should not require more levels of government — health care exchanges, health care czars. We make that argument. That’s the way we start to peel the onion back.”

But West’s take on the “repeal” message gets into a matter that came up in the final days of the Senate debate, when DeMint [claimed that](#) Section 3403 of the bill would make it impossible for the Senate to ever abolish the newly created Medicare Advisory Board.

“We will be passing a new law,” DeMint [warned](#) in a floor speech, “and at the same time creating a Senate rule that makes it out of order to amend or even repeal the law.”

DeMint’s warning was quickly picked up by Rush Limbaugh, who told his listeners that “there are unrepeatable aspects of the bill,” and that because those aspects “violated” the Constitution, conservatives would have better luck challenging the bill in court than trying to repeal it. Some conservative legal experts started laying the groundwork for such a challenge months before the bill passed in the Senate. In July, the conservative Federalist Society [published a paper](#) by Peter Urbanowicz and Dennis G. Smith which analyzed the possible avenues for a constitutional challenge to health care reform, such as arguing that a mandate violated the First Amendment’s right to freedom of religious expression, the “free exercise clause,” or the Fifth Amendment’s “takings clause,” which bars the government from seizing private property without payment. In November, Urbanowicz participated in a Federalist Society strategy session that delved deeper into the rationales for possible challenges. And on Dec. 21, this research informed an [“memo to the movement”](#) from the Conservative Action Project, a coalition of movement leaders that includes former Attorney General Ed Meese and FreedomWorks president Matt Kibbe.

“We urge you,” wrote conservative leaders in their memo, “to make this point to members of the U.S. Senate—and if a bill passes the Senate to impress upon members of both chambers of Congress—that the key provision in the healthcare legislation violates the U.S. Constitution.”

“Once a bill like this is enacted, it’s difficult to repeal,” Urbanowicz explained to TWI. “If it passed, I can see any number of groups finding a way to challenge it in court. Any taxpayer could file this challenge. I think you’d see multiple challenges in multiple district courts, given the really novel nature of the law and the controversy with which it was passed.”

The constitutional challenge route, however, is a trickier, slower, and less dramatic response to the health care bill than a Republican pledge to repeal it if the party takes back Congress.

“If the Obama health plan becomes law,” said the Cato Institute’s Cannon, “we will never get rid of it.”

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