Are the GOP Justices Political Hacks?

Exclusive: The “Obamacare” debate will test whether the U.S. Supreme Court’s five Republican justices are political hacks. After all, a right-wing think tank devised the individual mandate, which was embraced by GOP front-runner Mitt Romney, but it’s now anathema because it was passed by a Democratic president, Robert Parry writes.

By Robert Parry

Does anyone doubt that if a Republican president had enacted the Affordable Care Act with its individual mandate devised by the right-wing Heritage Foundation and with Mitt Romney denouncing “free riders” not paying their share of health care costs the U.S. Supreme Court’s Republican majority would be lining up to declare it constitutional?

Indeed, if the Heritage Foundation, which did dream up the individual mandate, were submitting supportive friend-of-the-court briefs instead of denouncing its own idea and if Romney were still deriding those “free riders” who palm off the costs for their emergency health care on others, the odds would be that the Court would vote overwhelmingly for the constitutionality of the health reform law.

After all, the Commerce Clause upon which the Affordable Care Act is based represents a virtually unlimited authority for Congress to enact laws to regulate interstate commerce, a power which can require individuals and companies to either do something or not do something.

For instance, in a Nov. 8, 2011, legal opinion affirming the constitutionality of the Affordable Care Act, conservative U.S. Appeals Court senior judge Laurence Silberman recognized this legal reality (even though he might not politically like “Obamacare”).

Silberman, an appointee of President Ronald Reagan but a serious constitutional scholar, explained how the law including its most controversial feature, the individual mandate requiring the purchase of health insurance coverage fits with the Commerce Clause.

“We look first to the text of the Constitution,” Silberman wrote in his opinion. “Article I, § 8, cl. 3, states: ‘The Congress shall have Power . . . To *regulate Commerce* with foreign Nations, *and among the several States,* and with the Indian Tribes.’ (Emphasis added by Silberman).

“At the time the Constitution was fashioned, to ‘regulate’ meant, as it does

now, '[t]o adjust by rule or method,' as well as '[t]o *direct.*' To 'direct,' in turn, included '[t]o prescribe certain measure[s]; to mark out a certain course,' and '[t]o order; to command.'

"In other words, to 'regulate' can mean to require action, and nothing in the definition appears to limit that power only to those already active in relation to an interstate market. Nor was the term 'commerce' limited to only *existing* commerce. There is therefore no textual support for appellants' argument" that mandating the purchase of health insurance is unconstitutional.

Silberman's last point bears repeating: There is "no textual support" in the Constitution for people challenging the Affordable Care Act's individual mandate.

So, for "strict constructionists" as the Republican justices claim to be it would seem to be a simple case. The Constitution grants Congress the power to regulate interstate commerce; health insurance has a substantial impact on interstate commerce; ergo, a legally enacted congressional statute regulating the sale and purchase of health insurance fits within the Constitution.

However, almost no one expects the bloc of five partisan Republicans to abide by their purported principles of judicial restraint and strict construction when the Affordable Care Act is debated before them this week. The reason for that skepticism is the recent history of these justices making a mockery of their judicial philosophies when they collide with GOP partisan needs.

Hitting Obama

And, even though the individual mandate was initially a conservative Republican idea an alternative to Democratic plans that would have required employer-supplied insurance or a single-payer system run by the government the GOP and the conservative movement have now turned against their own concept *en masse*. Not a single Republican voted for "Obamacare."

Therefore, at least some of the five Republicans John Roberts, Antonin Scalia, Clarence Thomas, Samuel Alito and Anthony Kennedy are expected to find some legal argument that they can use as judicial cover to strike a blow at the Democratic president, Barack Obama.

To do that in essence to overturn the legal reasoning of Appeals Court Judge Silberman the GOP justices will have to intuit some unstated right in the Constitution on behalf of Americans who simply don't want to buy health insurance.

Such creative legal reasoning is exactly what the right-wing justices typically

condemn. After all, the phrase “strict construction” is supposed to mean following the precise language of the Constitution and not “legislating from the bench.” But it is already clear that some of the Republican justices, such as Clarence Thomas whose wife is publicly campaigning against the law, will find whatever excuse is necessary to vote no.

For anyone who thinks that such a suspicion is overly cynical, you should think back on the unprincipled behavior of Justice Scalia, who was a prime mover in the U.S. Supreme Court shutting down a Florida state recount of the presidential vote in 2000 with the explicit intent of protecting George W. Bush’s “legitimacy” once the Court decided to hand him the White House.

In *Bush v. Gore*, Republican partisans on the Court, then including Chief Justice William Rehnquist and Justice Sandra Day O’Connor (who was considering retirement to care for her ailing husband), assembled a 5-4 majority on the key issue of rejecting the Florida recount standards and preventing them from being fixed.

It didn’t seem to matter that the Court’s intervention violated many of the supposed principles that the justices claimed to embrace, such as judicial restraint, respect for state privileges and refusal to divine meanings in constitutional provisions not explicitly stated by the Framers.

The five GOP partisans applied the 14th Amendment’s requirement of “equal protection” under the law, essentially turning this important post-Civil War principle on its head. After all, the recount was an effort to recover legitimate ballots cast on antiquated voting machines mostly by poor and minority citizens while voters from richer and whiter precincts had their ballots counted in a higher proportion on state-of-the-art equipment.

But the GOP Five didn’t mind perverting the 14th Amendment because they were looking toward a political higher cause: an excuse to “elect” Bush and thus give him the power to appoint future federal judges. What really mattered was continued Republican control of the Supreme Court, so the Constitution was treated as a malleable weapon for partisan purposes.

Scalia’s Turnabout

Though O’Connor may have had the most pressing concern about Bush’s appointment power so she could leave her seat to another Republican the hypocrisy was perhaps most striking for Justice Scalia, an advocate for an “originalist” interpretation of the Constitution, i.e. that the courts must follow the original intent of the Founders or those who approved constitutional amendments.

Thus, Scalia has argued that the 14th Amendment could only apply to black males

because in 1868, when the amendment was passed, it was intended to grant full citizenship to black males who were recently freed from slavery.

However, the amendment's language is much broader. It states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

During the 20th Century, courts increasingly interpreted the clear wording to guarantee fairness for women, gays and other people facing legal discrimination. However, Scalia has ridiculed such rulings as violating the "original intent."

"In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation," Scalia said in an interview with the legal magazine *California Lawyer*. "So does that mean that we've gone off in error by applying the 14th Amendment to both? Yes, yes. Sorry, to tell you that."

However, if the "original intent" of the amendment's drafters was so determinative that the 14th Amendment supposedly was only meant to apply to black men at the end of slavery it might be safe to assume that the drafters weren't thinking about protecting a white plutocrat like George W. Bush from possibly losing an election in Florida in 2000.

Yet, the 14th Amendment was precisely what Scalia and four other partisan Republicans on the Supreme Court cited to justify shutting down the Florida recount and handing the White House to Bush, despite the fact that he lost the national popular vote and apparently would have come out on the short end of the Florida recount if all legally cast ballots were counted.

In other words, Scalia and other right-wing justices operate with a situational ethic when it comes to "originalism" and "strict construction." If their partisan and ideological interests require the abandoning of those precepts, the principles are unceremoniously dumped overboard.

No Politics?

Of course, after the Court's *Bush v. Gore* ruling – and Al Gore's gracious-but-pained concession speech the next day – Justice Thomas insisted that politics played "zero" role in the court's decisions. Later, asked whether Thomas's assessment was accurate, then-Chief Justice Rehnquist answered, "Absolutely."

In later comments about the Court's role in the case, Rehnquist seemed unfazed

by the inconsistency of the Court's logic. His overriding rationale seemed to be that he viewed Bush's election as good for the country whether most voters thought so or not.

In a speech on Jan. 7, 2001, Rehnquist said sometimes the U.S. Supreme Court needed to intervene in politics to extricate the nation from a crisis. His remarks were made in the context of the Hayes-Tilden race in 1876, when another popular vote loser, Rutherford B. Hayes, was awarded the presidency after justices participated in a special election commission.

"The political processes of the country had worked, admittedly in a rather unusual way, to avoid a serious crisis," Rehnquist said. Scholars interpreted Rehnquist's remarks as shedding light on his thinking during the *Bush v. Gore* case as well. [For more details, see Consortiumnews.com's "So Bush Did Steal the White House" or the book, *Neck Deep*.]

A thankful Bush then used his authority over appointment of federal judges to further stack the Judiciary with right-wing ideologues, including later replacing Chief Justice Rehnquist with John Roberts and Sandra Day O'Connor with Samuel Alito.

So, with the presidential appointment power at stake again in 2012, the current Republican bloc of Roberts, Scalia, Thomas, Alito and Kennedy can be expected to be tempted once more with not just legislating from the bench but trying to tilt the political balance to the GOP.

For instance, their 2010 ruling on the *Citizens United* case allowing billionaires to pour unlimited money into negative campaign commercials was viewed as an advantage to Republicans and was condemned by Obama. Now, the same justices have a chance to deliver a body blow to the President who spent enormous political capital pushing through the Affordable Care Act.

Since many Americans still view the Supreme Court as the impartial arbiter of what's legal, they are likely to react to a judgment striking down "Obamacare" as reinforcement of the belief that Obama had wasted a year of the country's time getting the law passed.

Extracting a New Right

The expectation on the Right is that the five GOP justices will extract from the Tenth Amendment some previously unidentified "right" of a citizen not to have to submit to the broad congressional power embedded in the Commerce Clause.

On its face, the Tenth Amendment would seem to be irrelevant to the issue since it simply reserves for the states and individuals "the powers not delegated to

the United States by the Constitution." Because the Constitution does grant Congress power to regulate interstate commerce, the five Republicans would have to first conclude that the Commerce Clause does not cover regulation of the health insurance market despite its obvious significance to interstate commerce.

As Solicitor General Donald B. Verrilli Jr. noted in the U.S. government's court brief, uninsured Americans consumed about $116 billion in health-care services in 2008, meaning that those costs were either paid by health providers or passed on in higher premiums to other consumers, adding up to about $1,000 per family.

Given this undeniable impact on national commerce by uninsured Americans, the only serious legal issue remaining would seem to relate to the novelty of the solution, i.e. the individual mandate. Judge Silberman's ruling also addressed that point, concluding again that the law appeared to fall within constitutional precedents.

"Today, the only recognized limitations are that (1) Congress may not regulate non-*economic* behavior based solely on an attenuated link to interstate commerce, and (2) Congress may not regulate intrastate economic behavior if its aggregate impact on interstate commerce is negligible," Silberman wrote.

Neither limitation applied to the health-care law, Silberman noted, because medical insurance was clearly an economic activity and surely had sizable interstate implications.

As for the claim that people had a constitutional right not to participate in the purchase of health insurance, Silberman was not persuaded. For instance, he cited a Supreme Court precedent that a farmer who wished to raise wheat for his own consumption could still face federal restrictions because his production (and that of other likeminded farmers) could affect the overall supply of wheat and thus undermine federal policy regarding the wheat market.

Congressional Powers

Silberman also recognized Congress's power to address difficult national problems, like the tens of millions of Americans who lack health insurance but whose eventual use of medical services would inevitably shift billions of dollars in costs onto Americans who must pay higher insurance rates as a result, what courts have described as "substantial effects."

"The shift to the 'substantial effects' doctrine in the early twentieth century recognized the reality that national economic problems are often the result of millions of individuals engaging in behavior that, in isolation, is seemingly unrelated to interstate commerce," Silberman wrote.

“Its very premise is that the magnitude of any one individual’s actions is irrelevant; the only thing that matters is whether the national problem Congress has identified is one that substantially affects interstate commerce.

“It is irrelevant that an indeterminate number of healthy, uninsured persons will never consume health care, and will therefore never affect the interstate market. Broad regulation is an inherent feature of Congress’s constitutional authority in this area; to regulate complex, nationwide economic problems is to necessarily deal in generalities.

“Congress reasonably determined that as a *class*, the uninsured create market failures; thus, the lack of harm attributable to any particular uninsured individual, like their lack of overt participation in a market, is of no consequence.”

Silberman wrote that “Congress, which would, in our minds, clearly have the power to impose insurance purchase conditions on persons who appeared at a hospital for medical services as rather useless as that would be is merely imposing the mandate in reasonable anticipation of virtually inevitable future transactions in interstate commerce.”

He noted that since those challenging the health-care law “cannot find real support for their proposed rule in either the text of the Constitution or Supreme Court precedent, they emphasize both the novelty of the [individual] mandate and the lack of a limiting principle,” i.e. some example of when the government could not require citizens to purchase a specific product.

Silberman acknowledged that “the Supreme Court occasionally has treated a particular legislative device’s lack of historical pedigree as evidence that the device may exceed Congress’s constitutional bounds,” but added that “we are obliged and this might well be our most important consideration to presume that acts of Congress are constitutional” absent “a clear showing to the contrary.”

Silberman also addressed the core political objection to the health-reform law, its supposed intrusion on individual liberty. He wrote: “That a direct requirement for most Americans to purchase any product or service seems an intrusive exercise of legislative power surely explains why Congress has not used this authority before but that seems to us a political judgment rather than a recognition of constitutional limitations.”

He added: “It certainly is an encroachment on individual liberty, but it is no more so than a command that restaurants or hotels are obliged to serve all customers regardless of race, that gravely ill individuals cannot use a substance their doctors described as the only effective palliative for

excruciating pain, or that a farmer cannot grow enough wheat to support his own family.

“The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local or seemingly passive their individual origins.”

So, even a very conservative legal scholar examining the Constitution and precedents could not find a convincing argument to overturn “Obamacare” and that is because the Founders intentionally and broadly empowered Congress to address national economic problems through the Commerce Clause.

Among the principal advocates of the Commerce Clause were James Madison, the architect of the Constitution, and George Washington, who presided over the Constitutional Convention in Philadelphia in 1787. [See Consortiumnews.com’s “Madison: Father of the Commerce Clause.”]

Partisan Agenda

But it appears that constitutional principles will have less to do with how the Republican partisans on the Supreme Court rule than the perceived need to advance an ideological and political agenda.

These opponents of the health-care law surely will muster some impressive “lawyering” with lots of high-brow references to various articles and clauses just as they did in the *Bush v. Gore* ruling. But that will mostly be window-dressing to impress those who still believe in the integrity of this Supreme Court.

Of course, it is still possible that one or more of the Republican partisans will overlook their political loyalty to the GOP and their ideological commitment to the anti-government Right and agree with Judge Silberman that the Affordable Care Act is constitutional.

Such a justice might even think back on how the individual mandate began as a right-wing idea and thus refuse to behave as a political hack who simply switches constitutional principles based on whose name is associated with a law.

For instance, here is a Q and A by the magazine, *This Week*:

“Who first proposed making health insurance compulsory?

“The Heritage Foundation, a conservative think tank. In the late 1980s, when Democrats were pushing to require employers to provide health insurance, the foundation started thinking about ways to achieve universal coverage without placing a heavy burden on business. Its experts soon encountered the ‘free

rider’ problem: In a system where insurers are barred from refusing applicants with pre-existing conditions, many people, especially the young and healthy, would only buy a policy when illness struck.

“But if only sick people bought coverage, insurers would pay out more in doctors’ bills than they received in premiums, and quickly go bust. To overcome this death spiral, the Heritage Foundation suggested that every American be required to buy health insurance, a requirement known as the individual mandate.

“Which politicians took up that idea?

“Many Republicans did in the early 1990s, after President [Bill] Clinton introduced a plan that would have forced companies to cover employees. ‘I am for people, individuals, exactly like automobile insurance, having health insurance and being required to have health insurance,’ said Newt Gingrich, then House minority whip, in 1993.

“When the Clinton plan collapsed in 1994, talk of the individual mandate died with it. But a decade later, Mitt Romney, then the governor of Massachusetts, resurrected the concept for his state health-care plan, which requires residents to buy health insurance or pay up to $1,212 in annual penalties.

“‘It’s a Republican way of reforming the market,’ Romney said when the law debuted, in 2006. ‘[To have] people show up [at a hospital] when they get sick, and expect someone else to pay, that’s a Democratic approach.’”

During Campaign 2008, Obama opposed the idea of an individual mandate while Hillary Clinton supported it. After taking office, Obama changed his mind because he judged that adopting the Republican approach was the only way to win passage of a health-care bill. He also favored a “public option” as an alternative to private insurance.

However, with every Republican now voting against health reform, Obama had to jettison the “public option” to secure the 60 votes needed in the Senate to stop a GOP filibuster. When the bill was signed into law two years ago, Republican state officials immediately began filing legal challenges and the Right rallied Tea Partiers and other Americans against the law’s supposed intrusion on their “liberties.”

It quickly became an article of faith on the Right that the law was “unconstitutional.” However, the law will likely only be judged so if the five Republican justices do what a similar bloc of GOP justices did in December 2000 put their political interests ahead of the law.

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