When Is a Hack a Hack?

Exclusive: Ronald Reagan's Solicitor General Charles Fried sees "politics, politics, politics" at play in the apparent move by the Supreme Court's Republican majority to kill health-care reform, but the Washington Post's neocon editors say it's unfair to call any of those five GOP justices a "hack," reports Robert Parry.

By Robert Parry

So what has happened to many of those conservative "strict constructionists" who insist that only a literal reading of the Constitution is acceptable and that "activist" justices can't simply "create rights" for Americans that the Framers didn't write down?

Apparently, because these "conservatives" hate "Obamacare" almost as much as they detest President Barack Obama they're celebrating the hypocritical spectacle of five Republican justices on the Supreme Court demanding that new limitations be placed on Congress' constitutionally unlimited power to regulate interstate commerce.

These self-proclaimed "strict constructionists" can't find limitations in the actual Constitution, since none are there, so the GOP Five apparently intend to insert some new words into the founding document to post-facto (or perhaps ipso facto) disqualify the Affordable Care Act as "unconstitutional."

Maybe, the GOP Five should just drive down to the National Archives, pry open the case holding the Constitution and pencil in some new words. After the relevant section about Congress having the power to regulate interstate commerce, the GOP Five can scribble in "except for things like purchases of broccoli, gym memberships, cell phones and health insurance."

More likely, the GOP Five Justices Anthony Kennedy, Antonin Scalia, Clarence Thomas, John Roberts and Samuel Alito will come up with some more elegant wording that suggests a higher principle is involved.

After all, in December 2000, a subset of this group (Kennedy, Scalia and Thomas along with the late Chief Justice William Rehnquist and now-retired Justice Sandra Day O'Connor) dressed up its *Bush v. Gore* ruling with a lot of legal references.

Essentially, however, those five Republican partisans detected a previously unknown provision in the 14th Amendment requiring that when a Republican presidential candidate is in danger of losing an election, then all the voting

procedures in the key deciding state must have been identical, precinct to precinct. If they weren't and they never are the GOP candidate wins.

Post Editors to the Defense

On Friday, the Washington Post neoconservative editorial writers rallied to the defense of today's GOP Five as men of undying personal integrity who simply have an honest difference over how to read the Constitution.

While praising the three days of oral arguments as "the Supreme Court's civics lesson," the Post's editors expressed dismay over the "cynicism" of some liberals who "were preemptively trying to delegitimize a potential defeat at the court" by making the Republican justices look "partisan, activist and, essentially, intellectually corrupt."

How unfair, wailed the Post's editors. While the Post suggested that the five Republicans should show some "modesty and deference to elected legislators" who fashioned the difficult health insurance compromise, the Post seemed most upset that the integrity of the GOP Five was being questioned.

"We wouldn't assume anyone who disagrees [with the constitutionality of the law] is a hack," the Post declared.

And one might say the Post's editors, who treated Saddam Hussein's possession of WMD stockpiles as a "flat fact" in 2003 and who disparaged Americans who dared question the veracity of that *casus belli*, should know something about being hacks.

In Friday's editorial, the Post also adopted the posture that most befits a journalistic hack, the cowardly and simpleminded framing of debates as both-sides-are-equally-at-fault. The Post suggested that the four Democratic justices were somehow behaving in a partisan manner by following the actual wording of the Constitution.

"We share the disappointment that the justices on both sides of their ideological divide are, for the most part, so predictable," the Post lamented. "That's not, in an ideal world, how judging is supposed to work."

No, in an ideal world or even a world where we expect a modicum of philosophical consistency we might hope that Supreme Court justices would stick to interpreting the Constitution rather than demanding extemporaneous rewrites, or "limiting principles" that the Framers chose not to include.

Serious Conservatives

We also might expect in an editorial on this important topic a reference to what

the Commerce Clause actually says or an explanation of why serious conservatives, like senior Appeals Court Judge Laurence Silberman and Ronald Reagan's Solicitor General Charles Fried, came down solidly on the side of the law's constitutionality.

Silberman, a Reagan appointee, wrote the Nov. 8, 2011, ruling, for the U.S. Court of Appeals in Washington affirming the constitutionality of the Affordable Care Act. Silberman took pains to note the unrestricted wording of the Commerce Clause.

He wrote: "We look first to the text of the Constitution. 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]

Silberman continued: "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.

Let's hear that again: "There is therefore no textual support" in the Constitution for challenging the individual mandate as unconstitutional. At that point, "strict constructionists," as all the GOP Five claim to be, should have begun folding their tent or got to work on a constitutional amendment to rewrite the Commerce Clause.

Instead, the GOP Five got busy "legislating from the bench," demanding that the Obama administration provide some "limiting principle" to apply to the Commerce Clause that would differentiate health insurance (or the hundreds of other federal provisions that hinge on this clause) from Justice Scalia's goofy what-if question about buying broccoli.

Nor did the Post's editorialists address former Solicitor General Fried's comments in a March 28 interview with the Post's Ezra Klein. When asked about the "limiting principle" issue, Fried responded:

"The limiting principle point kind of begs the question. It assumes there's got to be some kind of articulatable limiting principle and that's in the Constitution somewhere. What Chief Justice John Marshall said in 1824 is that if

something is within the power of Congress, Congress may exercise that power to its fullest extent. So the question is really whether this is in the power of Congress.

“Now, is it within the power of Congress? Well, the power of Congress is to regulate interstate commerce. Is health care commerce among the states? Nobody except maybe Clarence Thomas doubts that. So health care is interstate commerce. Is this a regulation of it? Yes. End of story.”

Tea Party Comments

Fried also criticized some of the specific comments by the Court’s Republicans. “Justice Kennedy,” Fried noted, “said this fundamentally changes the relationship of the citizen to the government. That’s an appalling piece of phony rhetoric.

“There is an important change between the government and the system. It was put in place in 1935, with Social Security. And it said everyone has to pay into a retirement fund, and an unemployment fund. It was done when Medicare came in in the ’60s.

“That’s a fundamental change. But this? This is simply a rounding out in a particular area of a relation between the citizen and the government that’s been around for 70 years. Kennedy’s Tea Party-like argument that this fundamentally changing the relationship between government and the citizen? Well, I was very sorry to hear it.”

On policy substance as well as on constitutional principle, Fried was baffled by the Republican justices’ opposition to the law:

“I’ve never understood why regulating by making people go buy something is somehow more intrusive than regulating by making them pay taxes and then giving it to them. I don’t get it.”

Fried also took aim at the right-wing Heritage Foundation, which originated the individual mandate idea as an alternative to Democratic proposals for either a single-payer system or employer-mandated insurance, but now heatedly opposes its own concept. Fried said:

“It was comical to read the Heritage Foundation’s brief attempting to explain why they were changing their position on this. Something needed to be done about this problem. Everyone understood that. So, the Heritage Foundation said let’s do an individual mandate because it keeps it within free enterprise. The alternative was single payer. And they didn’t want that, and I’m in sympathy with that.

“So now all of a sudden the free-market alternative becomes unconstitutional and terribly intrusive where a government imposition and government-run project would not be? I don’t get it. Well, I do get it. It’s politics.”

When asked if the Supreme Court observers, who had initially considered the constitutional challenge to the law frivolous, had “underestimated the politicization of the Judiciary,” Fried answered:

“Politics, politics, politics. You look at the wonderful decision by [federal Judge] Jeff Sutton, who is as much of a 24-karat gold conservative as anyone could be. He is a godfather to the Federalist Society. Look at his opinion [in the Sixth Circuit upholding the law]. Or look at Larry Silberman’s opinion. I don’t understand what’s gotten into people. Well, I do I’m afraid, but it’s politics, not anything else.”

Fried’s “politics, politics, politics” point would seem particularly clear given the fact that the individual mandate to buy insurance was first developed by Heritage and first adopted by a Republican governor (and current GOP presidential front-runner) Mitt Romney of Massachusetts as a way to prevent “free riders” from getting health care and passing the costs to others.

Indeed, President Obama embraced the mandate idea after opposing it during Campaign 2008 because he concluded that it was the only way he could hope to win the votes of some moderate Republicans and conservative Democrats. But once Obama supported the idea, Republicans denounced it as an “unconstitutional” affront.

Then, after the law’s difficult enactment two years ago, the Republicans ran to the courts to get it overturned although conservatives have traditionally decried people who seek court intervention rather than working out policy differences through the political system.

Though serious conservatives like Silberman, Sutton and Fried judged the challenge to be without merit, it received a friendly hearing by the GOP Five on the Supreme Court. It’s now expected that the GOP Five will get busy behind closed doors drafting some ruling that will insert some newly invented “rights” into the Constitution.

Despite this rather obvious politicization of the federal courts, the Washington Post’s editors are more upset that “some liberals” would suggest that cynical politics is at work here. Yet, however you spin what the GOP Five is doing, it sure doesn’t look like the behavior of principled “strict constructionists.”

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Presidency of George W. Bush, **was written with two of his sons, Sam and Nat, and can be ordered at neckdeepbook.com. His two previous books, *Secrecy & Privilege: The Rise of the Bush Dynasty from Watergate to Iraq* and *Lost History: Contras, Cocaine, the Press & 'Project Truth'* are also available there.**

TV Stations Resist Listing Ad Buyers

Among the "winners" in Election 2012 will surely be the giant corporations that own many U.S. television stations as they rake in billions of dollars in SuperPAC and other political spending for attack ads. But these stations aren't eager to make these details easily available to the public, write Bill Moyers and Michael Winship.

By Bill Moyers and Michael Winship

Over the years we've been reporting on how power is monopolized by the powerful. How corporate lobbyists, for example, far outnumber members of Congress. And how the politicians are so eager to do the bidding of donors that they allow those lobbyists to dictate the law of the land and make a farce of democracy.

What we have is much closer to plutocracy, where the massive concentration of wealth at the top is protects and perpetuates itself by controlling the ends and means of politics. This is why so many of us despair over fixing what's wrong: we elect representatives to change things, and once in office they wind up serving the deep-pocketed donors who put up the money to keep change from happening at all.

Here's the latest case in point. The airwaves belong to all of us, right? They're part of "the commons" that in theory no private interest should be able to buy or control. Nonetheless, government long ago allowed television and radio stations to use the airwaves for commercial purposes, and the advertising revenues have made those companies fabulously rich.

But part of the deal was that in return for the privilege of reaping a fortune they would respect the public interest in a variety of ways, including covering the local news important to our communities. If they didn't, they would be denied their license to use the airwaves at all.

Alas, over the years, through one ruse or another, the public has been shafted. We heard the other day of a candidate for office in a Midwest state who complained to the general manager of a TV station that his campaign was not

getting any news coverage. “You want coverage?” the broadcaster replied. “Buy some ads and then we’ll talk!”

That pretty well sums up the game. But hold your nose: it gets worse. The media companies and their local stations including goliaths like CBS and Rupert Murdoch’s News Corp stand to pull in as much as $3 billion this year from political ads. Three billion dollars!

And most of that money will pay for airing ugly, toxic negative ads that use special effects, snide jokes and flat-out deception to take us to the lowest common denominator of politics.

The FCC, the Federal Communications Commission, which is supposed to make sure the broadcasters don’t completely get away with highway or, rather, airwave robbery has proposed to the broadcasting cartel that stations post on the Web the names of the billionaires, and front organizations many of them super PACs paying for campaign ads.

It’s simplicity itself: give citizens access online to find out quickly and directly who’s buying our elections. Hardly an unreasonable request, given how much cash the broadcasters make from their free use of the airwaves.

But the broadcasting industry’s response has been a simple, declarative “Not on your life!” It would cost too much money, they claim. Speaking on their behalf, Robert McDowell, currently the only Republican commissioner on the FCC the other one left to take a job with media monolith Comcast – said the proposal is likely “to be a jobs destroyer” by distracting station employees from doing their regular work.

The party line also has been sounded by Jerald Fritz, senior vice president of Allbritton Communications, who told the FCC that making the information available on the Internet “would ultimately lead to a Soviet-style standardization of the way advertising should be sold as determined by the government.” We’re not making this up.

Steven Waldman, who was lead author of the report that led to the FCC’s online proposal, quotes a letter from the deans of 12 of our best journalism schools: “Broadcast news organizations depend on, and consistently call for, robust open-record regimes for the institutions they cover; it seems hypocritical for broadcasters to oppose applying the same principles to themselves.”

Hypocritical, but consistent with a business that values the almighty dollar over public service. The industry leaves nothing to chance. Through its control of the House of Representatives, it got a piece of legislation passed this past week euphemistically titled the FCC Process Reform Act. George Orwell must be

spinning in his grave this isn't reform, it's evisceration.

Not only does the bill remove roadblocks to more media mergers further reducing competition it would subject every new rule and every FCC analysis of that rule to years of paper work and judicial review, enabling the industry's horde of lawyers and lobbyists, "to throw sand in the works at every opportunity" as one expert puts it.

There was a noble attempt by California Congresswoman Anna Eshoo to include in this bill an amendment that, like the FCC proposal, called for stations to post online who's putting up the big bucks for political ads. Shocker it was rejected. Score another one for the plutocrats.

There is some good news. The White House opposes this latest bid by the broadcasting oligarchy to further eviscerate the public interest. And the fate of the House bill in the Senate is uncertain at best.

In the meantime, as far as those political ads go, we're not totally helpless. Here's what you can do: Under current law, local television stations still have to keep paper files of who's paying for these political ads, and they have to make those files available to the public if requested. You can even make copies to take away with you.

So just go down to your nearest station, politely ask for the records, and then send the data online to the New America Foundation's Media Policy Initiative or to the organization of investigative journalists called ProPublica. Both have mounted campaigns to get the information online.

We'll link you to ProPublica and the New American Foundation at the "Take Action!" page on our own website, BillMoyers.com. Each is pulling together all the information on political ads they get from you and others crowd-sourcing and making it available to the entire country via the Internet.

If you're a high school teacher or college professor of journalism, have your students do it and maybe give them classroom credit for collecting the data democracy needs to work. In other words, here's a way citizens can take action even against the plutocrats who run Big Media and Congress.

Addendum: Free Press, the media reform group, also is conducting station file inspections, and has just published this easy-to-follow guide to how it's done: http://www.freepress.net/how-to-inspect-public-political-files

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What Iran Can Do to Strike Back

Israel’s threats to bomb Iran have hinged on how much damage Israeli aircraft can inflict on Iran’s nuclear facilities, but another worry is how much destruction Iranian missiles can inflict on Israel, a danger that Israeli officials are downplaying, Gareth Porter writes from Tel Aviv for Inter Press Service.

By Gareth Porter

The government of Prime Minister Benjamin Netanyahu has been telling Israelis that Israel can attack Iran with minimal civilian Israeli casualties as a result of retaliation, and that reassuring message appears to have headed off any widespread Israeli fear of war with Iran and other adversaries.

But the message that Iran is too weak to threaten an effective counterattack is contradicted by one of Israel’s leading experts on Iranian missiles and the head of its missile defense program for nearly a decade, who says Iranian missiles are capable of doing significant damage to Israeli targets.

The Israeli population has shown little serious anxiety about the possibility of war with Iran, in large part because they have not been told that it involves a risk of Iranian missiles destroying Israeli neighborhoods and key economic and administrative targets.

“People are not losing sleep over this,” Yossi Alpher, a consultant and writer on strategic issues and former director of the Jaffee Center for Strategic Studies at Tel Aviv University, told IPS in an interview. “This is not a preoccupation of the public the way the suicide bombers were a decade ago.”

Alpher says one reason for the widespread lack of urgency about a possible war with Iran is that the scenarios involving such a war are “so nebulous in the eyes of the public that it’s difficult for them to focus on it.”

Aluf Benn, the editor in chief of Haaretz, told IPS in an interview, “There is no war mentality,” although he added, “that could change overnight.” One reason for the relative public calm about the issue, he suggested, is the official view that Iran’s ability to retaliate is “very limited”.

Jeffrey Goldberg wrote in Bloomberg on March 20 that “Some Israel officials believe Iran’s leaders might choose to play down the insult of a raid and launch a handful of rockets at Tel Aviv as an angry gesture rather than declare all-out war.”

But Uzi Rubin, who was in charge of Israel's missile defense from 1991 to 1999 and presided over the development of the Arrow anti- missile system, has a much more somber view of Iran's capabilities.

The "bad news" for Israel, Rubin told IPS in an interview, is that the primary factor affecting Iran's capability to retaliate is the rapidly declining cost of increased precision in ballistic missiles. Within a very short time, Iran has already improved the accuracy of its missiles from a few kilometers from the target to just a few meters, according to Rubin.

That improvement would give Iran the ability to hit key Israeli economic infrastructure and administrative targets, he said. "I'm asking my military friends how they feel about waging war without electricity," said Rubin.

The consequences of Iranian missile strikes on administrative targets could be even more serious, Rubin believes. "If the civilian government collapses," he said, "the military will find it difficult to wage a war."

Rubin is even worried that, if the accuracy of Iranian missiles improves further, which he believes is "bound to happen," Iran will be able to carry out pinpoint attacks on Israel's air bases, which are concentrated in just a few places.

Some Israeli analysts have suggested that Israel could hit Iranian missiles in a preemptive strike, but Rubin said Israel can no longer count on being able to hit Iranian missiles before they are launched.

Iran's longer-range missiles have always been displayed on mobile transporter erector launchers (TELs), as Rubin pointed out in an article in Arms Control Today earlier this year. "The message was clear," Rubin wrote. "Iran's missile force is fully mobile, hence, not pre-emptable."

Rubin, who has argued for more resources to be devoted to the Arrow anti-missile system, acknowledged that it can only limit the number of missiles that get through. In an e-mail to IPS, he cited the Arrow system's record of more than 80 percent success in various tests over the years, but also noted that such a record "does not assure an identical success rate in real combat".

The United States and Israel began in 2009 developing a new version of the Arrow missile defense system called "Reshef" – "Flash" – or "Arrow 3", aimed at intercepting Iranian missiles above the atmosphere and farther away from Israeli territory than the earlier version of the Arrow. The new anti-missile system can alter the trajectory of the defensive missile and distinguish decoys from real missile reentry vehicles.

Until last November, the Arrow 3 system was not expected to become operational until 2015. And that plan was regarded by U.S. Missile Defense Agency (MDA) as probably too ambitious, because such a system would normally take a decade from conception to deployment.

But Xinhua news agency reported in November that Israeli Air Force officials said they expected Arrow 3 to become operational by mid- 2013, cutting even that abbreviated timeline for development of the system in half.

Nevertheless, the ability of the Arrow 3 system to shoot down an incoming missile still has not been announced, although an Israeli official said March 1 that such a test would take place after the meeting between President Barack Obama and Prime Minister Netanyahu.

In December 2008, Western intelligence sources were reported by Israel's Ynet News as saying the improved version of the Shahab 3 missile had gone into production earlier that year and that Iran was believed to be able to produce 75 of the improved missiles annually.

Gen. Gabi Ashkenazi, then IDF chief of staff, told a visiting congressional delegation in November 2009 that Iran already had 300 missiles capable of hitting Israeli targets, according to a U.S. State Department cable released by WikiLeaks.

Those reports suggest that Iran now has roughly 450 missiles that can reach Israel, half of which are improved models with much greater precision. Even if only one-fifth of those missiles get through Israel's missile defenses, Israeli cities could be hit by at least 100, most of which are able to hit targets with relative accuracy.

The Netanyahu government has sought to minimize the threat of Iranian retaliation for an Israeli strike against Iran in part by likening war with Iran to those fought against Hezbollah and Palestinian rockets in recent years, which have resulted in relatively few Israeli civilian casualties. That was the message that Israeli military officials conveyed to the Israeli news media after an escalation of violence between the IDF and Palestinian armed groups in Gaza earlier this month.

Columnist Zvi Barel of Haaretz speculated on March 11 that the purpose of the escalation, provoked by the IDF assassination of Zuhair al- Qaisi, the secretary-general of the Popular Resistance Committee in Gaza, was to show the Israeli public that Israeli missile defense system could protect the population against rockets that the IDF linked to Iran.

Barel went even further. "After Iron Dome demonstrated its 95 percent

effectiveness," he wrote, "there is no better proof to Israel's citizens that they will not suffer serious damage following an assault on Iran."

The success of the Iron Dome against short-range rockets from Gaza is irrelevant, however, to what could be expected from a relatively untested Arrow system against Iranian ballistic missiles aimed at Israeli targets.

Gareth Porter is an investigative historian and journalist specialising in U.S. national security policy. The paperback edition of his latest book, *Perils of Dominance: Imbalance of Power and the Road to War in Vietnam*, was published in 2006.