

COMMENTARY

President Obama's Top 10 Constitutional Violations

By Ilya Shapiro

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One of the biggest political changes that 2011 brought — in large part due to the tea parties and their effect on the 2010 election — is the centrality of the Constitution to our public discourse. Lawmakers and citizens no longer consider simply whether a given bill or policy proposal is a good idea but whether it is constitutional. “Where does the government get the power to do that?” is often critics’ rallying cry.

That’s a healthy development. For far too long, even in those rare moments when politicians were faced with constitutional concerns, they’ve had the attitude Nancy Pelosi did when asked about the authority for Obamacare’s individual mandate: “Are you serious?” Because, of course, constitutional arguments are the last refuge of the scoundrel who has no good policy arguments to make or political power to levy.

And so it’s a good thing that Americans are taking their founding document seriously. After all, the Constitution is the font of all federal power. Its carefully crafted structural provisions that we learned about in grade school, such as the separation of powers and checks and balances, are not merely an application of political theory.

“Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity,” Justice Anthony Kennedy wrote for a unanimous Supreme Court earlier this year. “By denying any one government complete jurisdiction over all the concerns of public life,” Kennedy continued, “federalism protects the liberty of the individual from arbitrary power.” If the federal government acts outside the scope of its delegated and carefully enumerated powers, then it’s no better than an armed mob.

The Obama administration and its allies in Congress have perpetrated more than their share of such mob-like actions. While it's hard to narrow them down, here's my stab at the government's top 10 constitutional violations since President Obama took office.

1. The individual mandate

No list of President Obama's constitutional violations would be complete without including the requirement that every American purchase health insurance, on penalty of civil fine. The individual mandate is unprecedented and exceeds Congress's power to regulate interstate commerce. If it is allowed to stand, Congress will be able to impose any kind of economic mandate as part of any kind of national regulatory scheme. Fortunately, the Supreme Court has a chance to strike this down during its current term.

2. Medicaid coercion

The Court will also be taking up Obamacare's massive intrusion on federal-state relations in the form of a coercive Medicaid expansion. The law compels states to drastically increase their Medicaid expenditures and reorganize their health care bureaucracies, on penalty of losing *all* (not just additional) Medicaid funds. No state contemplated such a program when it signed onto Medicaid — Arizona was the last to join, in 1982 — and now no state can afford to withdraw. Indeed, even if some withdrawal mechanism existed, withdrawn states' taxpayers would still be funding complying states' Medicaid programs. As the Supreme Court held in *South Dakota v. Dole*, there comes a point when "the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion."

3. The Independent Payment Advisory Board (a.k.a. "The Death Panel")

IPAB is the group of 15 presidential appointees who, beginning in 2014, are tasked with reducing Medicare spending. Any decisions IPAB makes automatically become law that can only be overridden by a three-fifths majority vote in the Senate. Unlike other federal agencies, IPAB is subject to no external review — no public notification in advance of proposed rules or opportunity for comment, no administrative guidelines and no judicial review. Medicare comprises about 13 percent of the federal budget, so that's an awesome amount of power for Congress to delegate to unelected executive-branch bureaucrats. Indeed, it's so basic a violation of traditional separation of powers that there's no historical analog. The Goldwater Institute has filed a strong

lawsuit challenging this (yet another) unprecedented aspect of Obamacare, which will continue wending its way through the lower courts regardless of how the Supreme Court rules on the individual mandate and Medicaid-coercion issues.

4. The Chrysler bailout

Building on the Bush administration's illegal use of TARP funds to bail out the auto industry, the Obama administration bullied Chrysler's secured creditors — who were entitled to “absolute priority” — into accepting 30 cents on the dollar, while junior creditors such as labor unions received much more. This subversion of creditor rights violates not just bankruptcy law but also the Constitution's Takings and Due Process Clauses. This blatant crony capitalism — government-directed industrial policy to help political insiders — discourages investors and generally undermines confidence in American rule of law.

5. Dodd-Frank

Intended to remedy weaknesses in the U.S. financial system — ensuring transparency and accountability — the Dodd-Frank financial “reform” empowered unlimited, unreviewable and often secret bureaucratic discretion. The administrative bodies the legislation created face no constraints on the exercise of arbitrary authority. For example, the Treasury Department now has broad and essentially unchecked power to seize banks and other financial entities that it determines are unsound but “too big to fail.” The new Consumer Financial Protection Bureau and Financial Stability Oversight Council, meanwhile, craft, execute and interpret their own law. Due process and separation of powers issues abound.

6. The deep-water drilling ban

Following the Deepwater Horizon oil spill, the Interior Department issued a blanket six-month moratorium on new oil and gas drilling in the Gulf of Mexico. A federal judge struck down that moratorium as arbitrary and capricious, but the government issued a new order to replace the one that was struck down. That order was subsequently withdrawn, but the judge was so shocked by the administration's conduct that he found the government in civil contempt of court.

7. Political-speech disclosure for federal contractors

In April of this year, President Obama released a draft executive order (still pending) that would require businesses with federal contracts to disclose independent expenditures on federal elections (political speech independent of candidates and parties). This order is intended to undermine the Supreme Court's *Citizen United* decision — allowing independent expenditures by corporations, unions and other associations — by discouraging federal contractors and their executives from engaging in political speech. *Citizens United* held that such expenditures do not enable the kind of *quid pro quo* corruption that campaign finance laws are allowed to regulate, so this draft executive order shows contempt for the First Amendment by chilling protected speech.

8. Taxing political contributions

Earlier this year, the IRS tried to muzzle political speech by asserting that donations to certain nonprofit advocacy groups (so-called 501(c)(4) organizations) would be subject to the gift tax. Historically, the IRS has not applied the gift tax in this way — donations to advocacy groups are not likely to be used to circumvent the estate tax — and when the IRS previously tried to tax political donations, it was rebuffed by the courts on the grounds that such transfers are not gifts (i.e., the donor is getting something in return). The IRS has since backed down, but the suspicion remains that it was trying to chill the political speech of those opposed to President Obama's policies, in violation of the First Amendment.

9. Graphic tobacco warnings

Late last year, the FDA issued regulations requiring cigarette manufacturers to display graphic warnings on all packs of cigarettes that must cover at least 50% of the packaging and graphically portray tobacco-related illnesses. These warnings violate the First Amendment because the government is compelling the cigarette manufacturers to discourage their customers from buying their lawful products. Last month, a federal judge blocked the new regulation, which was due to go into effect in January, but the administration is appealing.

10. Health care waivers

The Department of Health and Human Services has granted nearly 2,000 waivers to employers seeking relief from Obamacare's onerous regulations. Nearly 20 percent of these waivers went to gourmet restaurants and other businesses in Nancy Pelosi's San

Francisco district. Nevada, home to Senate Majority Leader Harry Reid, got a blanket waiver, while Republican-controlled states like Indiana and Louisiana were denied. Even beyond the unseemly political favoritism, such arbitrary dispensations violate a host of constitutional and administrative law provisions ranging from equal protection to the “intelligible principle” required for congressional delegation of authority to cabinet agencies. Unlike 17th-century English monarchs, American presidents were not granted dispensing powers: As we’ve seen, the power to suspend a legal requirement can and will be used to arbitrarily favor the politically connected. Moreover, most of these waivers were never authorized by Congress in the first place!



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