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Unraveled: Obamacare, Religious Liberty, and Executive Power

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I am very grateful to Eugene for allowing me to guest blog this week about my new book, "Unraveled: Obamacare, Religious Liberty, and Executive Power" (Cambridge University Press, 2016). "Unraveled," a sequel to "Unprecedented" (2013), chronicles the battles over the Affordable Care Act during President Obama's second term in office. (If you'd like a free preview, Cambridge has posted the TOC, introduction, and an excerpt of Chapter 1). My goal this week is to discuss five aspects of the ACA litigation that you (probably) didn't know. I also hope you can join me for book events at Georgetown Law Center on Sept. 27, the Cato Institute on Sept. 28, Columbia Law School on Sept. 29 and many others.

In the first post, I will address a critical aspect of the contraception-mandate litigation that is often forgotten: Congress was entirely silent about how the ACA's "preventive care" mandate would affect free exercise. As I also discuss in my forthcoming article in the Harvard Law Review Supreme Court edition, titled "Gridlock," the Obama administration's numerous attempts to balance religious liberty and access to contraception are completely ultra vires.

Then, I will chronicle the Obama administration's use of what I refer to as "government by blog post." Time after time, in the face of congressional gridlock, Obama turned to executive action to alter the ACA's onerous mandates. Specifically, he delayed and suspended the individual and employer mandates, as well as modified provisions affecting benefits for congressional employees and coverage in U.S. territories.

I will provide a detailed play-by-play of the superlative appellate litigation in *Halbig* and *King* against Burwell. On July 22, 2014, within a few hours of each other, the U.S. Court of Appeals for the D.C. Circuit and the U.S. Court of the Appeals for the 4th Circuit formed a circuit split about whether the federal government could subsidize insurance plans that were purchased on the federal exchange. (I promise, we will not rehash the meaning of "established by the state"). The challengers, represented by Mike Carvin at Jones Day, rushed to get the case to the Supreme Court as soon as possible. The solicitor general instead sought to have the newly-reconstituted D.C. Circuit rehear the case en banc, and keep it away from SCOTUS. This chapter of my book, titled "Dueling Petitions," should serve as a case study for appellate practice.

I will offer an inside glimpse into the origin of the House of Representative's ACA lawsuit against the Obama administration. In August 2014, the House contracted with the Baker

Hostetler law firm to bring the suit. Before signing the contract, the leadership of Baker had already cleared all conflicts, and "backed the case" for partner David Rivkin to handle the litigation. However, a number of clients — including insurance companies near Baker's office in Columbus, Ohio — pressured the firm to drop the case. I will reveal some new details about this ethical quandary, which should give all attorneys pause about their duties of loyalty and zealous representation.

I will close the series on Friday with an analysis of the court's short-handed decision in *Zubik v. Burwell*. Although the per curiam order has been called a "compromise," and advocates on both sides have claimed victory, it actually resolved very little. The challengers and the government still have a fundamental disagreement about whether contraception can be provided on the same, or separate plan.

Josh Blackman is a constitutional law professor at the Houston College of Law, and the author of "Unraveled: Obamacare, Religious Liberty, and Executive Power" (Cambridge University Press, 2016).