



Experts Argue Legal Aspects of Obamacare Case

By Robert Feinberg

March 9, 2015

Now that the Supreme Court has heard the oral argument in the case of *King v Burwell*, the case moves into the deliberation phase in order to deliver a decision in late June, which is quite expeditious for this Court.

Last Monday's article featured a single expert who was a strong proponent of Obamacare. Presumably the producers of C-SPAN's Washington Journal tried to find someone from the plaintiff's side and were unable to on short notice. On March 8, viewers were treated to a discussion with experts from both sides — Elizabeth Wydra, chief counsel of the Constitutional Accountability Center, which supports Obamacare, and Trevor Burrus, research fellow at the Center for Constitutional Studies of the Cato Institute, which backs the plaintiffs.

Veteran C-SPAN host Steve Scully, who is the face of the network on a day many Americans devote to brunch, the Sunday paper and public affairs programming, moderated the program. He began by asking what is the importance of the forthcoming decision. Wydra responded that it is "incredibly important," because without the subsidies that are at issue, the Affordable Care Act (ACA) "simply doesn't work," and all the benefits would go away, 10 million Americans would lose health insurance and the entire healthcare industry would go into a "death spiral," so all of the stakeholders have filed briefs in support of the administration's position.

Asked by Scully whether the subsidies are legal, Burrus, quipped that of course the hospital industry wants to continue to receive federal subsidies, and then he responded that, "Of course it's not legal." He insisted that the statute is clear, and the relevant term is "established by a state."

As far as the importance of the case, Burrus found importance in the "rule of law" and in curbing the powers of the president. He also disputed the assumption that a "death spiral" would ensue if the decision goes against the administration. He said for states had similar provisions to the ACA, including "community rating" and "guaranteed issue," without any subsidies, and they didn't go into a death spiral, and he listed New York, Vermont, Maine and Massachusetts before Romneycare, so from his point of view the effect of striking the law down is unknown.

Wydra referred to a brief by public health deans predicting 10,000 deaths if the law is struck down.

Most interesting was the discussion about how the Court might break down. Scully asked Burrus if he was surprised that Chief Justice Roberts was the swing vote. Burrus recalled that he had predicted this but was surprised that Roberts chose the tax theory as the basis for his previous vote, whereas the plaintiffs won on the Commerce Clause issue. Burrus called Robert "in play." He assigned a 50 percent chance of Roberts upholding the ACA and a 20 percent chance to Justice Kennedy.

Wydra said she was encouraged that Kennedy raised "federalism" concerns arising from the burden overturning the ACA would place on the states, because they would lose the subsidies.

Scully played an audio clip of Kennedy's question, and this writer was intrigued that he used the word "coercion" rather than stressing the impact of losing the subsidies. Wydra argued that the law should be upheld because it is politically popular and Burrus refrained from contradicting her.