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Supremes alerted to Obama's pattern of 'lawless behavior'

By Bob Unruh

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The Obama administration has exhibited a “discomfiting pattern of behavior” in changing congressionally approved laws to meet political needs, including its offer of subsidies to people who buy through the federal exchange, contrary to the Affordable Care Act, a court filing claims.

Faced with “a statute that yielded politically unpopular results,” the president at one point suspended the individual mandate for millions, “waived ‘minimum essential coverage’ requirements in 2014” and expanded the scope of hardship exemptions in a manner “entirely inconsistent with Congress’ design.”

That’s according to a new brief submitted by the Cato Institute in the King v. Burwell case pending before the U.S. Supreme Court.

The case argues the plain language of the Obamacare law says only those who sign up through state exchanges will be eligible for subsidies. But the Obama administration is giving them to people who sign up through federal exchanges as well.

The subsidies were expanded for political reasons, the brief charges.

“As with the individual and employer mandates, the administration was faced with another key provision that yielded politically unpopular results. Section 36B was a third pillar propping up the ACA. It authorized subsidies, in the form of refundable tax credits, for health insurance bought through a state-established exchange. The ‘credit’ ‘shall be allowed’ based on the number of months the ‘taxpayer … is covered by a qualified health plan … enrolled in through an exchange established by the state,’” the brief argues.

In a Volokh Conspiracy blog analysis, David Bernstein explained that the Supreme Court in the case “is set to decide whether Obamacare subsidies for policies procured from exchanges are only available when the exchange was ‘established by a state,’ as the plain text of the law says.”

Deferring to the administration’s interpretation of the law, in this case, would be “foolhardy.”

“No Obama political appointee is going to write regulations that say, in essence, ‘Oops, we (at best) forgot to account for the possibility that most states wouldn’t create exchanges, so let’s throw in the towel on the whole Obamacare thing by denying subsidies to residents of states that have federal exchanges,’” he wrote.

Then, too, he noted, the pattern fits Obama.

“The Obama administration has engaged in consistently lawless behavior with regard to implementing Obamacare, delaying, modifying, and changing the law on the fly, with no input from Congress, and not even a pretense of going through the normal notice and comment process for regulatory changes,” he wrote.

“The administration has taken upon itself the power to ‘make law,’ completely outside lawful processes, and often with barely a fig leaf of pretense that it’s doing so for anything but overtly political reasons.”

He said Cato’s argument is broad. If the court endorses the IRS interpretation that exchanges established by the state include federally established exchanges, “you will not just be deferring to the IRS’s interpretation of ‘established by a state,’ but also implicitly endorsing a pattern of unlawful rulemaking by the Obama administration.”

“This is the court’s one chance to assert that the rule of law is more important than the Obama administration’s political machinations, or for that matter the viability of Obamacare, concern for which is the source of the lawlessness in question,” he wrote.

Bernstein is a professor at the George Mason University School of Law in Arlington, Virginia. His books include”You Can’t Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws.”

The Cato brief notes that in a “normal” political environment, Obama could have asked Congress for a correction to the law. But it noted that under the circumstances – it was adopted by only Democrats, many of whom were pressured, during a lame-duck session of Congress, which since then has tried to repeal it many times – that was impossible.

“It is entirely beside the point that the gridlocked Congress was – and is – unwilling to amend the ACA as the executive desires. As this court recently explained in a unanimous decision against this particular president’s similar end-run around Article I, ‘political opposition’ in Congress does not ‘qualify as an unusual circumstance’ to justify the unlawful exercise of a presidential power,” the brief notes.

“If the executive can unilaterally act based on his evolving conception of the ACA’s purpose, just about any decision that expands coverage (such as paying illegal subsidies) or even eliminates coverage (by waiving mandates) can be justified. A ruling to uphold this behavior sets a dangerous precedent for this nascent superstatute, which will be implemented for years to come by different presidents with different views of the law.

“Perhaps the most troubling aspect of the government’s expansive understanding of ACA implementation is that this precedent could be used in future to license virtually any executive action to modify, amend, or suspend any duly enacted law,” the brief argues.

The case, which is to be heard by the court March 4, is one of several that could create a massive roadblock for Obamacare. At the district court level, Judge Ronald White in Muskogee, Oklahoma, ruled that subsidies, in the form of tax credits, apply only to consumers in the 14 states that have set up insurance marketplaces and not to individuals who buy insurance on the federal marketplace, as in Oklahoma.

“The court is upholding the act as written,” White said, citing language in the law that limits subsidies to those in states with their own exchanges.

Another pending claim against Obamacare alleges the law violates the Fourth, Fifth and Ninth Amendment provisions on privacy.

The complaint also cites Articles I, II and III of the Constitution regarding the separation of powers and focuses on two issues: the requirement to buy insurance and the control that will be vested in the Individual Price Advisory Board, a new creation of the federal law that is unanswerable to Congress and unaccountable to the federal courts.

WND also reported on yet another lawsuit pending in federal court that charges Obama unilaterally altered the law without approval from Congress, which means it’s no longer legal.

In its first trip to the Supreme Court, Obamacare was ruled constitutional but only after the justices re-interpreted the “penalties” required by the law as a “tax,” a stance the Obama administration originally argued against.

In its second trip, the justices ruled that a “closely held” for-profit business can opt out of Obamacare’s universal contraception requirement based on religious objections.