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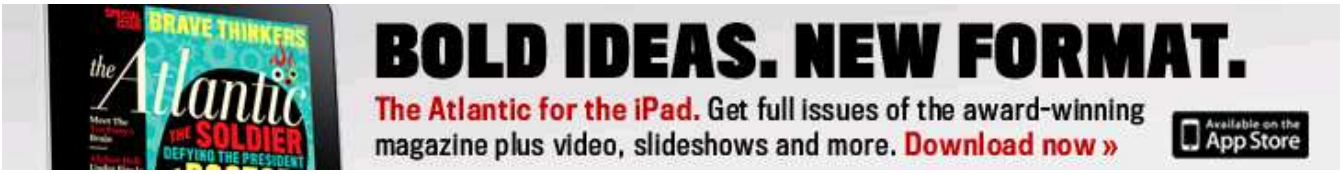

PPACA One Year On

By Clive Crook

A year ago this week Congress passed and President Obama signed the Patient Protection and Affordable Care Act. Michael Cannon of the Cato Institute organized a conference on Monday to take stock. As a libertarian, Cannon opposes the reform, but the meeting brought supporters as well as sceptics together. It was a good event and you might want to watch it on the think-tank's website. It seems to be in two pieces, here and here.

The future of the reform, as you know, is uncertain.

First, the legislative prospects are unclear. Republicans hope to repeal the law outright. Failing that, they plan to sabotage it by withholding resources. Second, what the law actually means is unclear. The administration is only now beginning to fill in the details. Much depends on the wide discretion the administration has in implementing the law. Third, PPACA faces constitutional challenges which have turned out to be a lot more serious than the law's advocates expected. Fourth, the reform is likely (in my view, at least) to worsen long-term fiscal pressures, so will require further work on that account even if all goes smoothly in the short-term.

There are several lines of constitutional attack, but the main one is aimed at the individual mandate. The question is whether the federal government can penalize people for failing to buy a privately provided good (health insurance). On a plain reading of the constitution, the answer would seem to be no: there is no such enumerated power. However, the court has established a long tradition of torturing the commerce clause to eradicate the originally intended limits on federal power. It seems a fair bet that it will turn the screw once more, in what most of the justices will see as a good, legitimate cause. Their task will be to find some principle that limits (for now) the scope of this further extension of federal power. Otherwise, there would be no constitutional bar to the government's requiring people to buy any private good it sees fit to promote (leafy vegetables, travel on high-speed trains). In Britain and most other countries, of course, governments would be entirely within their rights to do such a thing. But this is the US, so the Court will have to explain why health insurance is special, constitutionally speaking.

David Rivkin (counsel for the plaintiffs in Florida v. HHS, which yielded reform opponents a big win) said the case could reach the Supreme Court in its 2011 term, a schedule that would imply a ruling in

the summer of 2012, in nice time to play a key role in that year's elections.

The Cato discussion drove home to me that the administration has something of a dilemma in making its case on the constitutional issue. The more it argues that the mandate is necessary to make the larger scheme work, the greater the danger that the court might throw out the entire law and not just the offending part (as the judge in the Florida case did). If only the mandate had to go--the court finding it unconstitutional, but severable from the rest--the administration would have to mend its reform, but not start from scratch. Achieving the law's element of compulsion through the tax system rather than the mandate would be simple enough, so this kind of constitutional setback would not be lethal to the larger effort. But if the government admits that the mandate is inessential, hence severable, it can hardly claim that it is "necessary and proper" as part of its larger scheme, which is the legal strategy it has pursued up to now.

One other thing struck me. During a panel, I asked the law's opponents, Cannon and Doug Holtz-Eakin, whether they thought universal coverage was a correct objective. Cannon bravely argued that it was not. Holtz-Eakin said universal coverage already exists--thanks to the Emergency Medical Treatment and Active Labor Act (EMTALA), which puts hospitals under an obligation to treat urgent cases regardless of the patient's ability to pay. The health-care debate, he said, is about regulating health insurance, not about whether there or should not be universal coverage.

I think Cannon is wrong. Universal coverage is a compelling goal, and a perfectly feasible one, as every other rich country in the world has shown. And I think Holtz-Eakin's answer is an evasion, at best. EMTALA does not guarantee access to what most people would regard as essential medical services (such as treatment for chronic diseases). However, what EMTALA did do is institutionalise enormous cost-shifting and thus destabilize the private model of health-care provision. As Neera Tanden (a reform supporter) argued, if you oppose universal coverage in the ordinary meaning of the term, as a matter of logic you should also oppose EMTALA. It really has to be both or neither.

On a related point, I asked Roger Pilon (Cato's leading voice on the constitutionality of the reform, and a trenchant opponent of the law) whether he thought that Medicare, like the mandate, is also unconstitutional. He said it is--though remedying this defect, he added swiftly, is not something that could be done abruptly. No indeed. In fact, it could not be done at all, under any conceivable circumstances. Dual-sovereignty constitutionalists like Pilon (who believe the constitution's original limits on federal power must be revived) may be reading the constitution correctly--in fact, I think they are--but they lost this fight decades ago, and there is simply no going back.

The constitutional skirmish over the mandate, however it turns out, is small stuff. The larger war is over, and the feds won. As for whether PPACA is good policy, that is an entirely different question. As I've mentioned before, good policies can be unconstitutional, and bad ones can be constitutional. It is a weakness of US politics that these quite separate issues nearly always get fused together.

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