CONSTITUTION Daily
Smart Conversation about the Constitution

Constitution Check: Can the government legally delay the health care mandates?

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July 11, 2013

Lyle Denniston looks at questions about whether federal agencies have too many opportunities to go their own way in implementing laws passed by Congress.

THE STATEMENTS AT ISSUE:

"After more than two years of voting repeatedly and unsuccessfully to repeal the health care law, Republicans believe they are getting traction, thanks to what they see as the Obama administration's self-inflicted wound over the employer mandate....Some Democrats were also dismayed by the White House's actions. Senator Tom Harkin of Iowa, the chairman of the Senate Health, Education, Labor and Pensions Committee and an author of the health law, questioned whether Mr. Obama had the authority to unilaterally delay the employer mandate. 'This was the law. How can they change the law?' he asked."

– Jonathan Weisman and Robert Pear, writers for The New York Times, in a story on July 9 about the government's announcement of a one-year delay of the new health care law's mandate that companies with more than 50 full-time employees must provide insurance coverage for their workers by next January 1 or face financial penalties of $2,000 per worker.

"The statute gives the Treasury Secretary the authority to collect these penalties...It does not allow the secretary to waive the imposition of such penalties...Congress spoke to the question of whether and when the Executive should be able to waive the employer mandate....Nevertheless, Treasury claims it had the authority to waive those penalties without following Congress' instructions."

– Michael F. Cannon, director of health policy studies for the Cato Institute, a libertarian advocacy organization, in a public statement July 8 calling the delay illegal.

WE CHECKED THE CONSTITUTION, AND...

The Constitution's Article II assigns to the President the national government's "executive power," and tells the President that "he shall take care that the laws be faithfully executed." It does not say how that is to be done, or when, but the emphasis on being "faithful" at least implies that the President will respect the choices that Congress has made and written into law.

At the same time, Article II does not say that a law shall be carried out at all cost, so every President operates on the assumption that federal agencies can be given some leeway in how they do it. And every lawyer advising a President is certain to provide more than one memo saying that the process of executing a law should aim at ensuring that it carries out the goal Congress set for it, even if that means varying somewhat from the text.

Given the complexity of modern government operations, very few of the laws that Congress passes are completely self-executing; most if not all of them require regulations to put them into actual effect. And writing regulations is the business of the federal agencies. An array of government agencies have been working for more than three years, for example, to write the rules for the new Affordable Care Act – the vast new law regulating the entire health care financing system.

The Supreme Court just last month went a long way toward requiring federal courts to trust the government agencies that execute the laws to interpret for themselves just what authority Congress has given them in their areas of official activity. What an agency decides is the range of its power, that ruling said, should be given considerable deference by the courts.

Very telling in that decision in the case of *City of Arlington, Texas, v. Federal Communications Commission* is that it was written by Justice Antonin Scalia, the Court's strongest believer that the courts should be very strict in following the letter of the laws that Congress passes. The actual text, not what someone said about it, is what controls, he has said, over and over. Scalia, a former professor of administrative law, seems quite tolerant of agency discretion.

The whole question of government agencies' discretion has now arisen anew in the wake of a controversial announcement earlier this month by an assistant secretary of the Treasury Department, Mark J. Mazur. When he disclosed that the government was postponing for a year – until January 1, 2015 — the mandate that larger employers provide health insurance coverage for their workers, Mazur did not cite one word or phrase in the Affordable Care Act giving the Treasury permission to adopt a delay.

But the announcement did refer to the conclusion made by officials that writing the formal regulations to implement the employer mandate was going to take more time. Rushing the rules, Mazur said, would only frustrate the goal of making sure that employers do provide such insurance. Many employers already provide coverage, and the new law's requirements on how to do that, and on how to report to the government, should be done right, the statement implied.

Since that announcement, of course, the Affordable Care Act has moved back to the center of political conversation in Washington, with some critics of the law seizing on the delay as proof that the law is inherently unenforceable, and some supporters saying that the critics will only be happy when they have killed the entire project.

Underneath the heated rhetoric of those exchanges, and the dueling political agendas that are at work, there does exist the opportunity for a reasonable debate about whether Congress speaks clearly enough when it writes complex new laws, and about whether the federal agencies do have or at least claim to have too much opportunity to go their own way in implementation. It is not too much to ask of the institutions at each end of

Washington's Pennsylvania Avenue – Congress and the White House – that they show a little more mutual respect.

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