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No surprise: Fourth Circuit rejects Virginia's challenge to ObamaCare mandate

posted at 4:47 pm on September 8, 2011 by Allahpundit
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So predictable was this, and so meaningless are these appellate rulings ultimately, that on a busier news day I wouldn't even bother with it. Plain and simple, the Supreme Court isn't about to let a decision as epochal as the one coming on ObamaCare to be guided by what some lower court thinks. But since we pop the champagne every time some judge strikes down the mandate, here's the obligatory sadface for the Fourth Circuit today. What are the odds that a panel consisting of one Clinton appointee and two Obama appointees would find a massive regulatory power grab by Congress copacetic?

[Lyle Denniston's summary](#) of the rulings (yes, there were two separate cases decided) is your best bet. Superficially, both opinions turn on procedural issues. In one decision the court found that Virginia had no standing to sue over the law because the mandate affects individuals, not states; in the other, it found that Liberty University couldn't challenge the mandate yet because — drumroll — the mandate is actually *a tax* and under federal law you can't sue over a tax until you've been forced to pay it. No one's had to pay anything under the mandate because it's not in effect yet, ergo the legal case isn't quite ripe. And yes, before you ask, The One *has* insisted all along that the mandate isn't a tax but something altogether different. In fact, as Denniston notes, so politically toxic is the tax argument that the feds actually dropped it on appeal to the Fourth Circuit even though it ended up being strong enough to win them the case. No doubt The One would prefer to see O-Care upheld by the Supreme Court for whatever reason than struck down as unconstitutional, but that day-after press conference where he has to explain that this actually is a huge new tax hike on the uninsured would be one for the ages.

As I say, though, the procedural issues were only superficial. Note this passage from Denniston:

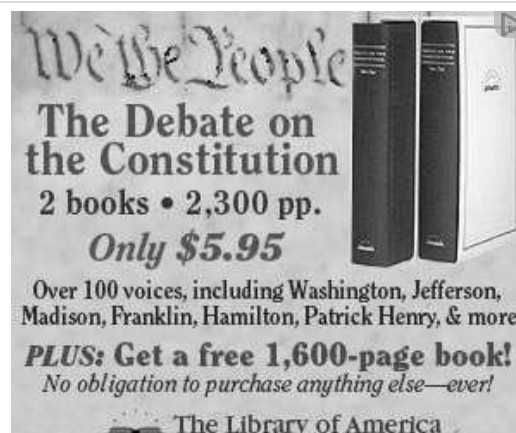
Circuit Judge Wynn, while supporting Motz's opinion on the tax injunction issue, offered his own opinion on the merits of the insurance-purchase mandate. He said **he would uphold its constitutionality as a valid use of Congress's power to tax**. Since he regarded the penalty enforcing the mandate to be a tax, Judge Wynn explained, that leads back to the conclusion that the anti-injunction law bars the challenge.

Circuit Judge Davis, in a 73-page dissenting opinion, argued that the federal courts do have jurisdiction to rule on the challenges to the insurance-mandate and its enforcement penalty, and concluded that the mandate and penalty were a **valid exercise of Congress's authority to pass laws regulating interstate commerce**. Davis dismissed the majority's view that the courts lacked jurisdiction as a "rather strained construction" of the anti-injunction law.

In other words, a majority of the court found that ObamaCare is valid *on the merits*, not merely that the parties to these cases couldn't sue. Again, that's no surprise given the composition of the panel but the fact that the majority was split between the tax theory and the Commerce Clause theory raises the possibility that the Supreme Court could split that way too. Imagine if, say, the four conservative justices found the mandate unconstitutional, the four liberal justices upheld it on Commerce Clause grounds, and smilin' Anthony Kennedy decided to split the baby and find that it's unconstitutional under the Commerce Clause but constitutional under the tax power. That would save the mandate — as long as five justices think it's constitutional for whatever reason, it's binding law — but it would complicate the precedential value of the opinion. The next time Congress tries some massive power grab on Commerce Clause grounds and it's challenged in court, the plaintiff could point to the ObamaCare opinion and note that five justices — a majority — found the mandate *unconstitutional* on that theory. All along we've been assuming that O-Care will rise or fall depending on where the Court lands on the Commerce Clause, but today's ruling reminds us that that's not necessarily true. We could end up with a bizarre result in which the Court finally draws the line on Congress's regulatory power and yet upholds ObamaCare anyway — as a tax. I wonder if that compromise approach appeals to the famously squishy Kennedy.

If that's not enough prospective ObamaCare litigation to keep you happy, go read [this post at Cato](#) about how those hot new federally subsidized health-insurance exchanges might not be subsidized after all. Why not? Because of ... a drafting error.

Update: I tweaked the headline because it's technically not true that the court upheld the O-Care mandate. Two of the three judges did, but they were writing independently, not as part of one of the two majority opinions. The holdings by the court were simply that the challenges can't proceed for procedural reasons.



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Justice Kennedy will decide this.

It's fate.

fossten on September 8, 2011 at [4:49 PM](#)

Allah, they punted. They did not find the mandate to be constitutional. They instead stretched procedure to avoid giving an opinion.

NotCoach on September 8, 2011 at [4:53 PM](#)

And the President and his minions want so desperately to appoint many many more judges.

Speakup on September 8, 2011 at [4:54 PM](#)

It didn't uphold the mandate. It only said the the State of Virginia doesn't have standing to bring a suit.

scrubjay on September 8, 2011 at [4:55 PM](#)

Justice Kennedy will decide this.

It's fate.

fossten on September 8, 2011 at 4:49 PM

Thread Winner!...:)

Dire Straits on September 8, 2011 at [4:57 PM](#)

Again, that's no surprise given the composition of the panel but the fact that the majority was split between the tax theory and the Commerce Clause theory raises the possibility that the Supreme Court could split that way too.

I severely doubt that. If I remember right until today the 1 thing that was common in every single decision on Obamacare was that the penalty associated with the individual mandate was just that, a penalty, and not a tax. In fact some of the courts have specifically rejected the tax argument.

Zaggs on September 8, 2011 at [4:57 PM](#)

I thought it wasn't a tax...

[Washington Nearsider](#) on September 8, 2011 at [4:57 PM](#)

The Democrats are in a real lose/lose situation thanks to their recklessness and arrogance in cramming that POS through.

forest on September 8, 2011 at 4:59 PM

Rulings like this are so disturbing in that they underscore the precariousness of freedom, and just how hostage we all are to a small breed of idiots in black robes.

rrpjr on September 8, 2011 at 5:01 PM

I thought it wasn't a tax...

Washington Nearsider on September 8, 2011 at 4:57 PM

Depends on who the WH is defending it to....

sicoit on September 8, 2011 at 5:03 PM

Yep, boring and predictable. To the SC it goes. Holder will pull all his strings to postpone it to after Nov. 6, 2012.

Justice Thomas can't wait for it.

Schadenfreude on September 8, 2011 at 5:03 PM

And yes, before you ask, The One has insisted all along that the mandate isn't a tax but something altogether different.

Obama has said that it isn't a tax, but in all these cases his lawyers have actually been arguing that it is a tax.

Mark1971 on September 8, 2011 at 5:05 PM

Terp Mole, what's your opinion on this?

rogerb on September 8, 2011 at 5:06 PM

and just how hostage we all are to a small breed of idiots in black robes.

rrpjr on September 8, 2011 at 5:01 PM

Yep. Who rule purely based upon the party who put them in their position.

lorien1973 on September 8, 2011 at 5:07 PM

Activist Judges.

Del Dolemonte on September 8, 2011 at 5:08 PM

Imagine if, say, the four conservative justices found the mandate unconstitutional, the four liberal justices upheld it on Commerce Clause grounds, and smilin' Anthony Kennedy decided to split the baby and find that it's unconstitutional under the Commerce Clause but constitutional under the tax power.

The problem with that is that the Dems, as well as Obama, are all on the record insisting it was *not* a tax. Obama is on film saying this to Steffi. They did not want in any way to imperil Obama's promise that those making under 250K would not see any tax increase.

Now they are abandoning the commerce clause argument and going for the taxing power argument. The Florida district court judge picked up on the inconsistent statements in his opinion, as did the circuit court.

Wethal on September 8, 2011 at 5:08 PM

What happened to crr6?

Schadenfreude on September 8, 2011 at 5:10 PM

Contemptible.

Midas on September 8, 2011 at 5:13 PM

and just how hostage we all are to a small breed of idiots in black robes.

rrpjr on September 8, 2011 at 5:01 PM

Yep. Who rule purely based upon the party who put them in their position.

lorien1973 on September 8, 2011 at 5:07 PM

The end justifies the means, apparently.

Midas on September 8, 2011 at 5:14 PM

Who cares?

David in ATL on September 8, 2011 at 5:14 PM

Well, the good news is the Tiawanese can't make a good animation of Rick Perry, thus making him more electable.
<http://themorningspew.com/2011/09/08/taiwanese-animators-do-rick-perry-meh/>

bloggless on September 8, 2011 at 5:18 PM

So let the courts find that the mandate is a tax. Taxes are easier to repeal than federal "mandates."

Rational Thought on September 8, 2011 at 5:19 PM

What happened to crr6?

Schadenfreude on September 8, 2011 at 5:10 PM

She was accidentally splattered with hot grease while working at her job at Taco Bell, and she's at home on her bed in her parents' basement, recovering from her injuries. ;)

AZCoyote on September 8, 2011 at 5:20 PM

The Fourth Circuit has historically been the most conservative circuit. Quite an odd coincidence, therefore, that one Clinton and two Obama appointees would wind up on this panel.

Erich66 on September 8, 2011 at 5:22 PM

They instead stretched procedure to avoid giving an opinion.

NotCoach on September 8, 2011 at 4:53 PM

So you're saying that Obama appointees voted "present"?

Who'd a-thunk?

malclave on September 8, 2011 at 5:25 PM

I will, of course, wait until I read what crr6 has to say about this ruling before I can form my opinion.

carbon_footprint on September 8, 2011 at 5:26 PM

“...but that day-after press conference where he has to explain that this actually is a huge new tax hike on the uninsured would be one for the ages.”

He would say it while laughing to himself..

Seven Percent Solution on September 8, 2011 at 5:29 PM

So I take it, Kagan isn't recusing herself from this?

capejasmine on September 8, 2011 at 5:30 PM

Reading around, the Virginia v Sebelius case probably deserved to go down in flames on “standing.” While Virginia may have had standing vis-à-vis a Medicaid claim, on the “individual mandate,” Virginia is not an individual, and they went to war so quickly they forgot to include a few.

This isn't a victory for ObamaCare. This was just sloppy lawyering.

J_Crater on September 8, 2011 at 5:42 PM

Weird, in less than three years, Obama has made four appointments to the 4th Circuit, and it looks like all four were appointed within the span of a year. By comparison, G.W. and Billy Bob appointed a total of eight to that circuit in their sixteen years. Nevermind, it USED to be the most conservative circuit.

Erich66 on September 8, 2011 at 5:55 PM

What happened to crr6?

Schadenfreude on September 8, 2011 at 5:10 PM

Either she's still up in Wisconsin working on the recall elections “pro bono” or a victim of the “ban-hammer”... Not sure which...

Khun Joe on September 8, 2011 at 6:19 PM

were a valid exercise of Congress's authority to pass laws regulating interstate commerce.

This is way beyond regulating commerce.

darwin on September 8, 2011 at 6:32 PM

This is the first out of eight court decisions to rule that the fine for not having insurance is a tax rather than a penalty. That improves Obamacare proponents' record using this argument to 1-6-1.

aunursa on September 8, 2011 at 6:35 PM

It's all moot because conservatives will roll into power 2012 and scrap it.

John the Libertarian on September 8, 2011 at 6:37 PM

Let's quit kidding ourselves. We have gotten to the point that in general this is little outside the Fed's jurisdiction if they really want to do something. We have judges that have twisted the meaning of the constitution and we have legal precedents that morph overtime to allow this insanity. This SCOTUS will uphold the law.

CW on September 8, 2011 at [6:41 PM](#)

This is the first out of eight court decisions to rule that the fine for not having insurance is a tax rather than a penalty. That improves Obamacare proponents' record using this argument to 1-6-1.

anursa on September 8, 2011 at 6:35 PM

They can't change the definition the democrats gave it. They called it a penalty. The courts can't just arbitrarily change it to a tax.

darwin on September 8, 2011 at [6:43 PM](#)

What happened to crr6?

Schadenfreude on September 8, 2011 at 5:10 PM

Who cares?

David in ATL on September 8, 2011 at 5:14 PM

jbh45 on September 8, 2011 at [7:40 PM](#)

They can't change the definition the democrats gave it. They called it a penalty. The courts can't just arbitrarily change it to a tax.

darwin on September 8, 2011 at 6:43 PM

Wanna bet?

It seems the courts can do whatever they like. The Constitution means only what the Courts want it to mean. If they decide that the right to privacy requires publishing names and addresses of gun owners on the internet, no matter how incoherent the reasoning, it's official.

I'm afraid if we don't do something to strip this unlimited power from the Supreme Court — like allowing decisions to be "repealed" by a two-thirds vote of both houses of Congress if the president signs the repeal legislation — then their power is becoming limitless.

Congress actually passed a law — as the Constitution gives them full power to to — removing the right of any federal courts to have jurisdiction over detainees in Gitmo except the D.C. Circuit, and SCOTUS went right ahead and declared they were entitled to habeas corpus. Without a scrap of a clause in the Constitution giving them such a right.

We're getting to the point where the Supreme court will arrogate to itself the right to throw out even Constitutional Amendments as unconstitutional.

The Supreme Court of Florida did exactly that when the state Constitution was amended to declare that the death penalty was not to be understood as cruel and unusual punishment. The pretext was that the people who voted for that Constitutional amendment didn't understand what they were voting for.

tom on September 8, 2011 at [8:09 PM](#)

a valid exercise of Congress's authority to pass laws regulating interstate commerce.

You can't buy insurance from another state, by federal law you can't have insurance that crosses state lines... and insurance is "interstate commerce". Which means commerce crossing state lines.

Apparently they're spending too much time teaching Legalese to lawyers and they've forgotten to teach simple common freaking sense. How the heck does anyone with a basic understanding of the English language confuse this issue this badly?

What part of commerce that is legally prohibited from crossing state lines "interstate commerce"?

So the right to regulate interstate commerce means regulating commerce that never crosses state lines, can't cross state lines, and is legally prohibited from crossing state lines now?

I shudder to find out what our other rights "really mean".

The second amendment simply is your right to be shot by a government official without cause... that's it, nothing else.

What, is that stupider than their interpretation of interstate commerce? I don't see how anything could be.

gekkobear on September 8, 2011 at [8:20 PM](#)

There should be a super-majority type of process to overrule the SC.

stenwin77 on September 8, 2011 at [8:24 PM](#)

This is no longer a nation of laws, but a nation of opinions.

sadatoni on September 8, 2011 at [9:47 PM](#)

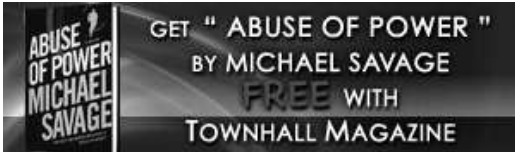
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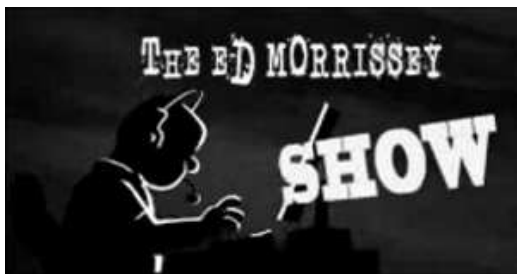
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