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Granting certiorari to an ACA challenge

David Kopel, of the Independence Institute, discusses the constitutionality of the Affordable Care Act for our on-line symposium.

The following essay for our symposium is by David Kopel, Research Director of the Independence Institute, in Golden, Colorado, and an adjunct professor of Advanced Constitutional Law at Denver University. He is also an Associate Policy Analyst at the Cato Institute. He filed amicus *briefs in the Obamacare litigation in the Eleventh Circuit and the D.C. Circuit. His recent articles on the constitutionality of Obamacare have addressed the commerce power (Michigan Law Review online), the Necessary and Proper Clause (Yale Law Journal online), and Chief Justice Marshall (Engage).*

While there is little doubt that the Supreme Court will eventually decide the constitutionality of the "Patient Protection and Affordable Care Act," generally known as "Obamacare," the Supreme Court in granting certiorari will make several important decisions.

Back when the law was being pushed through Congress, some proponents blustered that the constitutional concerns raised by skeptics were bogus, and the legal challenges to the law would go nowhere. Justice Breyer took a more realistic view. Testifying on April 15, 2010, before the House Financial Services and General Government subcommittee, Justice Breyer predicted that the new health care law would likely appear before the Supreme Court. While Justice Breyer expressed no opinion on the merits, he did implicitly acknowledge that the new law pushes into a constitutional gray area which will need to be resolved by the Court.

Thus far, three federal courts of appeals – the Fourth, Sixth, and Eleventh – have heard oral arguments, and the D.C. Circuit has a case scheduled for oral argument in September (*Seven-Sky v. Holder*). So far, a decision has been issued by the Sixth Circuit, and a petition for certiorari was filed on July 27. Based on oral argument, the plaintiffs in the Fourth Circuit are likely to lose, and they would then presumably also file for certiorari. Oral argument in the Eleventh Circuit indicated a significant possibility of a ruling against the federal government. If so, we can probably expect the Department of Justice to petition for rehearing en banc.

Because of the difficulties of aligning the schedules of so many judges, en banc rehearings typically take many months to arrange. And of course, when more judges are involved, writing the opinion can take longer too.

From the administration's viewpoint, the slower the better. The longer the cases take to get to the Court, the greater the opportunity for President Obama to appoint another Justice. And the more that the PPACA can entrench itself in operation, the more reluctant the Court might be to strike down the law – or to strike down the entire law if part of it is unconstitutional.

Indeed, it will be interesting to see if severability is among the questions presented in the certiorari grant. In the case brought by the Virginia Attorney General, the federal district court found the individual mandate unconstitutional, but declined to find the statute as a whole unconstitutional, because disentangling the unconstitutional mandate-dependent provisions from the rest of the statute would be too complex. Conversely, the district court judge in the Florida case ruled the entire statute unseverable, and therefore void, for nearly the same reason.

At the court of appeals level, the Obama administration finally retreated from its dual theories that the mandate is essential to the law as a whole, but, if the mandate is unconstitutional, it can be severed from everything else. The administration conceded that if the mandate fails, then so does the requirement that insurance companies cover all applicants, and lose the right to set prices based on the applicant's current health.

Surely there are provisions in the 2400-page law which could have constitutionally been enacted separately, such as nutrition labeling for the menus of restaurant chains, or the tax on tanning salons. Yet it is also true that without the mandate, it is doubtful that the package as a whole would have been enacted. The mandate was, after all, the payoff to "Big Insurance" that was necessary to win their lobbying support and the millions that they spent in advertising on behalf of the Obamacare bill. Any oligopoly would be thrilled with a nationwide law which forces unwilling consumers to buy the oligopoly's products, and that also mandates that only expensive versions of the product can be sold.

The cert. grant will certainly include the question of whether the mandate can be justified under the interstate commerce power; the issue necessarily includes the related issue of whether the Necessary and Proper Clause can rescue the mandate.

It is unclear whether the Justices will grant cert. on the Obama administration's back-up argument, that the mandate can be imposed via the federal tax power. So far, not one judge, not even the judges who ruled in favor of the mandate on interstate commerce grounds, has accepted the tax theory, and most have explicitly rejected it. The Fourth Circuit requested supplemental briefing on the issue, and if that Circuit relies in part on the tax theory, then the theory would probably have enough public viability to force Supreme Court consideration.

But if the tax argument keeps up its record of zero support from the lower court judges, then the main reason for the Court to let the administration make the tax argument would be so that if the mandate fails on interstate commerce grounds, the Court shields itself from the accusation that it failed to consider an alternative justification.

Realistically, the tax argument has essentially no chance of actual success in the Court. The interstate commerce theory, while stretching the interstate commerce power further than it has ever gone before, at least has the virtue of arguably being within a gray zone – as evinced by the split among lower court judges. In contrast, the tax theory requires many more intellectual contortions, and has far more obstacles to overcome.

Assuming that one gets past the problem that Congress chose to call the penalty a "penalty" rather than a "tax," and indeed changed draft language in order to do so, then there's the problem of figuring out what kind of tax it is. It's can't be a "direct" tax, since it's not apportioned by population, as Article I, Section 9 of the constitution requires all direct taxes to be. Although the penalty is collected via the income tax form, the penalty is not a Sixteenth Amendment income tax, because such taxes are based on income "from whatever source derived"; in *Commissioner v. Glenshaw Glass Co.* (1955), the Court established that "derived" means "undeniable accessions to wealth." Mere refusal to purchase a congressionally designed product is not an accession of wealth. The individual who chooses not to buy Obamacare insurance has precisely as much wealth after he doesn't buy the insurance as he did before.

So if the penalty really is a tax, it must be some form of indirect tax. To call it a "duty" or "impost" would be a stretch, since the insurance is not being bought from a foreign country, or even interstate, and even if it were, a normal duty or impost would tax the purchase of that insurance product, rather than the non-purchase.

Excise taxes have historically been applied to the purchase, ownership, or use of something (*e.g.*, carriages, machine guns), or to some activity. An excise tax could be applied to the purchase of potato chips, but not to passively sitting on one's couch. The only exception has been the excise tax on trusts that fail their legal duty to distribute trust earnings. The trust tax on non-distribution involves a prior obligation which the trust voluntarily assumed as its very reason for existence.

The more constitutionally plausible issue that could be the surprise in a cert. grant is whether the mandate that states hugely expand Medicaid eligibility is a violation of the

Tenth Amendment. This issue is raised only in the twenty-six-state case led by Florida. At oral argument, the Eleventh Circuit indicated that it was taking the issue seriously.

Regarding conditional federal grants, in 1987 in *South Dakota v. Dole*, the Court said "Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" In the Court's view, though, the grant at issue, in *South Dakota*, a cut-off of five percent of federal highway funds for refusal to raise the drinking age to twenty-one, was only "relatively mild encouragement." Since then, no lower court has found a federal grant program to violate *South Dakota v. Dole*, and legal commentators have struggled to articulate a workable legal standard for what might constitute unconstitutional compulsion.

Certainly if any grant program is such compulsion, it is the Obamacare Medicaid mandate. State spending on Medicaid has already become a huge share of state budgets, crowding out all sorts of discretionary spending. Under Obamacare, states must either: (1) Drastically expand Medicaid eligibility, thus setting themselves on the road to long-term fiscal ruin; or (2) Be punished with a complete cut-off of all Medicaid funds, thus forcing the states to double their own Medicaid spending (a fiscal impossibility) in order to maintain benefits for current recipients. If this Hobson's choice is not a violation of *South Dakota v. Dole*, then nothing is.

Whenever the Court enforces the Tenth Amendment, some persons complain that the Court is not supposed to do so. The complainers assert that the New Deal settled the issue that the Tenth Amendment is a mere "truism," according to the 1941 case U.S. v. Darby. Yet the Tenth Amendment, like every other Amendment, is supposed to guide judicial interpretation. If the Amendment is a truism, it is an affirmation of the truth that the federal spending power does not, and never has, included the power to demolish state sovereignty over the single largest item in most state budgets.

Besides, the proponents of Obamacare are committed to a "living Constitution" that must evolve in response to changing public ideas. The notion that the federal interstate commerce power can include control over purely intrastate insurance contacts, or over health care itself, is directly contrary to original meaning, and to Chief Justice Marshall's exposition of the commerce power in *Gibbons v. Ogden*. So if the Court should follow living constitutionalism in favor of a vastly expanded interstate commerce power, then the Court is at least as well justified in taking the Tenth Amendment seriously. After all, the Tenth Amendment now stands higher in public consciousness than at any time in over a century; in 2010 many candidates won (and thereby changed party control of the House of Representatives) by making the Tenth Amendment the centerpiece of their platforms.

A "living Constitution" is not one trapped in the amber of a "New Deal" that ended before most of today's Americans were even born. The progressive commentariat may consider the Tenth Amendment obsolete, but the American people do not. The New Deal is old history, and the modern Supreme Court is no more obliged to follow the New Deal Court's crabbed view of the Tenth Amendment than Warren Court Justices were obliged

to follow the crabbed interpretation of the Equal Protection Clause from the Progressive Era.

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