THE RIGHT PRESCRIPTION

Supreme Court Allows Obamacare to Metastasize

By David Catron on 4.26.11 @ 6:09AM

The Supreme Court's decision to deny Virginia's request for expedited review of its Obamacare lawsuit was disappointing but not surprising. Even the Old Dominion's Attorney General, Kenneth Cuccinelli, has admitted all along that his chances of convincing the high court to grant his "petition for a writ of *certiorari* before judgment" were quite low. Nonetheless, the White House and its accomplices in the "news" media have greeted the decision with thinly disguised glee. And it is indeed a significant victory for the supporters of Obamacare. Despite the virtual certainty that the Supreme Court will eventually hear one of the myriad constitutional challenges to the unpopular "reform" law, yesterday's decision dooms these cases to another year of wandering aimlessly in the appellate wilderness.

This protracted journey will allow Obamacare to embed itself in our health care system so deeply that, by the time the Court deigns to hear one of the challenges, it may be impossible to safely extract the tumor. As Sam Stein gloats in the *Huffington Post*, "The rejection of Cuccinelli's effort to short-circuit the process represents a small but welcomed victory for the law's defenders. There will be more time for the laws to be implemented before it comes before the court." This extra time is obviously what the Department of Justice (DOJ) hoped to gain when it opposed Virginia's petition. Considering its professed confidence in Obamacare's constitutionality, it's difficult to imagine any other reason for the DOJ's strenuous efforts to prevent the Court from "short-circuiting the normal course of appellate review."

What, you ask, happened to that expedited appeals process we've read so much about? Well, the word "expedite" has a different meaning for lawyers and judges than it does for the rest of us. While it is true that *Virginia v. Sebelius* and several other Obamacare challenges will be heard in

various appeals courts during the next couple of months, the resultant rulings won't materialize until the end of the summer. Then, as legal scholar Brad Joondeph explains, "The losing side has 90 days to file a petition for a writ of *certiorari*, and the winner 30 days to respond, at which point the petition will be calendared at the Supreme Court." After all that, assuming the Court agrees to hear one of the cases, the justices will "hear argument in the spring of 2012, and issue a decision by the end of June 2012."

Meanwhile, the infection spreads. While the lawyers argue over hopelessly arcane points of law and the judges issue dueling opinions, Obama administration apparatchiks will be working furiously behind the scenes to implement Obamacare. They have already introduced a voracious tape worm of regulations that will wind itself so thoroughly around the entrails of the health care system that removal will be a virtual impossibility in a year or so. The latest example can be found in the rules promulgated by CMS administrator Donald Berwick concerning Accountable Care Organizations (ACO), the government's latest rebranding of the old HMO gambit. Although the section of the law calling for the creation of ACOs is a mere six pages long, Berwick's bureaucrats transmuted them into no fewer than 429 pages of regulations.

And the number of rule-generating agencies is also growing. In addition to cozy little boutiques like the Center for Consumer Information and Insurance Oversight (CCIIO), whose primary function seems to involve providing waivers for labor unions and other sources of Democrat campaign funds, Obamacare provides for more than 100 new bureaucracies. How many will be up-and-running by the time the Supreme Court stoops to consider the individual mandate? No one knows exactly. In fact, according to the Congressional Research Service, "The precise number of new entities" that will eventually be created by the Byzantine health law is "currently unknowable." We do not, however, need to consult the Delphic Oracle to know that more than a few will sprout up while we await the pleasure of the Court.

Also coming on line while we wait is the Community Living Assistance Services and Supports (CLASS) Act, Obamacare's federally subsidized entitlement for long-term care. This program was shown to be fiscally unsustainable a year before the law was passed and is now the target of repeal legislation introduced by South Dakota Senator John Thune. The Secretary of Health and Human Services, Kathleen Sebelius, admits the program is unsustainable as written but plans to move forward with implementation nonetheless. She has told Congress that she will fix the CLASS Act by making a variety of changes to the program. The HHS Secretary is not, it turns out, authorized under the law to make such changes. But, as Sebelius has demonstrated before, mere legal authority is not a particularly important consideration.

Fiscally unsustainable new entitlements, proliferating bureaucracies, and over-regulation are by no means the only ways Obamacare will metastasize while *Virginia v. Sebelius* wanders through the appellate wilderness. There will be new taxes on businesses, downward adjustments in Medicare rates, the gutting of the Medicare Advantage program, restrictions on the right of physicians to own certain types of health care facilities, ad infinitum. Ilya Shapiro of the Cato Institute advises: "That the Supreme Court declined to take up the Obamacare litigation before even a single appellate court had ruled on it is neither surprising nor game-changing." Strictly from the perspective of constitutional law, he is presumably right. However, in terms of the health of our medical delivery system, the decision is definitely a "game-changer."

If Obamacare has another year to metastasize, it may well be impossible to eradicate the disease without killing or at least badly maiming the patient. In fact, it is conceivable that the DOJ will

make that very argument when the case finally arrives before the Court, betting that the justices will be loath to strike down Obamacare -- or even the individual mandate -- knowing that such a ruling would create chaos in the midst of an election year. And it is by no means obvious that such a ruling would work against Obama's bid for reelection. It isn't hard to imagine the President including the Court in "the enemies of change" against whom he will inevitably run in 2012. The eleven words, "The petition for a writ of certiorari before judgment is denied," represent worse news than most people realize.

David Catron *is a health care revenue cycle expert who has spent more than twenty years working for and consulting with hospitals and medical practices. He has an MBA from the University of Georgia and blogs at Health Care BS.*