



## The Fourth Branch Reinvents ObamaCare

Thu, 08/09/2012 - 1:41pm | posted by Brian Gilmore

The former head of the Centers for Medicare and Medicaid Services (CMS) Donald Berwick infamously made the following statement in [praising Britain's National Health Service](#):

*[A]ny health care funding plan that is just, equitable, civilized, and humane must – must – redistribute wealth from the richer among us to the poorer and less fortunate. Excellent healthcare is by definition redistribution.*

ObamaCare- or the Patient Protection and Affordable Care Act- is the product of this same socialist ideological tradition that views government-run health care as a central component of any comprehensive wealth transfer scheme. However, the PPACA's methods are more devious and radical than the NHS in accomplishing this goal. The main consumer-level redistribution provisions in PPACA are the refundable premium tax credits and cost-sharing subsidies available to individuals purchasing policies on the soon-to-be-established "exchanges."

These tax provisions were at issue on Friday as IRS Commissioner Douglas Shulman testified in front of the House Oversight and Government Reform Committee. Shulman's difficult job was to defend the Department of the Treasury's recently issued regulations implementing PPACA's tax credits. Why was that such a difficult job? That requires some background on how PPACA's statutory provisions are structured.

As expertly laid out in a working paper by Case Western Reserve University School of Law Professor Jonathan Adler and Cato Institute Director of Health Policy Studies Michael Cannon (available [here](#)), PPACA orders the states to setup exchanges where individuals can purchase insurance policies. Of course, the federal government has no constitutional authority to compel the states to enforce federal law (see *Printz v. United States*, 521 U.S. 898 (1997)), but such trivial constitutional matters weren't much of a concern for the Pelosi/Reid tandem.

Many state governors have already refused to comply with this requirement. And none have done so quite as bluntly as Rick Perry's recent letter to Secretary of HHS Sebelius, in which he stated of the state exchange requirement: "It essentially treats the states like subcontractors through which the federal government can control the insurance markets and pursue federal priorities rather than those of the individual states."

And what of the states that intend to snub their subcontractor orders from Washington by not setting up an exchange? PPACA directs Sebelius to establish a federal exchange for the state. Section 1321(c) states:

*(c) FAILURE TO ESTABLISH EXCHANGE OR IMPLEMENT REQUIREMENTS.—*

*If...the Secretary determines, on or before January 1, 2013, that an electing State...will not have any required Exchange operational by January 1, 2014...the Secretary shall ...establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements.*

**So they covered all their bases, right? Not quite. The tax credits in PPACA specifically apply only to individuals who purchase insurance through an exchange established by a state.** (See Sections 1401 and 1402 of PPACA)

It would be difficult to overstate the magnitude of this oversight considering the scale of PPACA's intended reach. This loophole should have largely undermined PPACA's concept of affordability. Without wealth redistribution, how could PPACA possibly make coverage larded up with expensive mandates "affordable" for the law-abiding citizen intent on satisfying his new individual mandate? After all, PPACA is supposed to provide the refundable premium tax credit to individuals up to 400% percent of the federal poverty level, which is a whopping \$92,200 of annual income for a family of four in 2012.

Enter the Department of the Treasury. Multiple media outlets are reporting that only 14 states have adopted plans to establish an exchange prior to the January 1, 2013 deadline to get Sebelius's special bureaucratic stamp of approval for operation beginning January 1, 2014. The Obama administration has already gone to extreme ends to assert executive power in the executive branch's failure to perform its constitutional duty to execute the law (e.g., immigration, welfare work requirements, DOMA). So maybe it should come as no surprise that the administration would show similar disregard for the Constitution's legislative process by rewriting PPACA through the regulatory process.

The full text of the final regulations is available [here](#). In the preamble, Treasury offers the following feeble defense of applying the tax credits to the fallback exchanges established by the federal government:

The statutory language of... the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange...and the federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of...the Affordable Care Act as a whole.

In what's commonly referred to as Chevron deference, the U.S. Supreme Court has established strong deference to an agency's statutory interpretation (see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Under the "Chevron two-step," the court first looks to whether the Congressional intent is explicit in the statute. If not, the court will defer to the agency's reasonable interpretation. Unfortunately for the Treasury, in this case there's no need for step two.

When pressed last Friday by the House Oversight and Government Reform Committee on the clear discrepancy between PPACA's statutory provisions and Treasury's implementing regulations, IRS Commissioner Shulman stated: "Congress writes the laws and we interpret them. If you disagree, there's always the courts." Shulman has every reason to be confident that the courts no longer pose a serious threat to PPACA. But where he got it wrong is presuming that the courts would be the logical outlet for disagreement with this latest in the Obama administration's prolific record of constitutional crises. What he should have said is that if you disagree, there's always the ballot box.

We should be equally confident that a Romney administration will withdraw these regulations immediately while seeking full repeal of PPACA. Somehow I wouldn't be surprised if Shulman is withdrawn from his office in much the same manner.

---

*Brian Gilmore is an ERISA and employee benefits attorney who specializes in assisting employers with health and welfare plan compliance matters.*