



The Volokh Conspiracy

Win or Lose, My Thanks

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On the eve of the historic Supreme Court decision on the constitutionality of the individual insurance mandate, I don't know what the outcome will be any more than anyone else. I have never made a prediction and won't start now. From the beginning, I always insisted that the challenge was serious, but also an uphill climb. I never dismissed the case for the constitutionality of the ACA as frivolous. I usually ended my set speeches by saying that the smart money is always on the Supreme Court upholding an act of Congress. [Intrade](#) notwithstanding (71.5% this morning), I suppose I still think that's right.

I said before the oral argument that, if I knew the outcome of the case when the argument was over (as I thought I did in *Raich*), it would mean we lost. If we had won, I would not know it. At the end of the ACA argument, I was in the latter position. As when I was a trial lawyer, I felt very good about the way our case went in, but you never can be sure what a jury will do. I will never forget the feeling in the pit of my stomach every time a jury filed into the box to announce its verdict. I will have that same feeling at 10am tomorrow morning. Big time.

Tomorrow, the "highest court in the land" returns its verdict. Today, I want to say thanks to my cobloggers for the significant contributions they have made to this historic challenge. (I think it is OK to use "historic" twice in this post.) **Ilya Somin**, **Jonathan Adler**, and **Dave Kopel** made vital contributions to the substance of the arguments and, with **David Bernstein**, responded skillfully to the manifold criticisms that were launched against our challenge. Win or lose, this blog was instrumental in developing the arguments that earned us 6 hours of oral argument spread over 3 days. Those who credit the **Volokh Conspiracy** with responsibility for the viability of this challenge are right to do so, but it is nothing nefarious. Just free speech. So thanks **Eugene** for creating this forum and inviting me in.

I especially want to thank **Orin Kerr** for his unstinting and unflinching skepticism from day one. I admit that, at times, I found his posts personally annoying, and my one regret over the past 2+ years of litigation is in sometimes letting my annoyance show. But this was entirely my problem, not his. His indefatigable resistance to every argument offered against the constitutionality of the individual insurance mandate was essential to the growth and improvement of these arguments, especially in the first year of their development. He was a one-man moot court testing every claim, refusing to be brow beaten into concurring with a conclusion he simply could not accept. There is no question in my mind that our theories would not have developed as well as they did without his intellectual combativeness and persistence. If the challenge happens to succeed tomorrow, he will merit some share of the credit for that outcome.

Other than my testiness with Orin, I have no regrets. Win or lose, I believe that we litigated the crap out of this case. **Ken Cuccinelli** and his excellent shop in the **Virginia AG's office** earned the first court victory that shook the confidence of the mandate's supporters and changed the narrative. Lawyers for

the **Thomas More Law Center, Liberty University**, and the **American Center for Law & Justice** developed important arguments in their lawsuits and made compelling oral arguments in the Sixth, Fourth and DC Circuits respectively. I was honored to work with these fine and principled attorneys.

David Rivkin, who had opposed the constitutionality of the individual mandate **way back in 1993**, heroically brought suit on behalf of the National Federation of Independent Business and a bevy of lawyer clients, each with their own opinions about how to litigate a case, and managed the case to a successful conclusion in the Northern District of Florida. It was David's WSJ op-ed in September 2009 that stimulated my first blogging on the subject on the *Politico's* Arena blog, and then here. David was there for the Constitution when no other firm in town wanted the case.

Ilya Shapiro and **Trevor Burris** at the **Cato Institute** performed yeoman's work on the amicus briefs filed with me as their client. These briefs allowed me to get my theories into the litigation, before I became a formal part of the challenge as a lawyer for the NFIB.

I wish to thank my old friend **Richard Epstein** for inviting me to deliver the Hayek Lecture at the NYU School of Law in October of 2010, which provided a forum in which I could develop the legal theory underlying the challenge in a more rigorous way for publication in the **NYU Journal of Law and Liberty**. I am also grateful to **my Georgetown colleagues** who never uttered an unkind word in response to my efforts, even after vetting them in more than one faculty workshop, and **my Georgetown & Penn students** for their enthusiasm.

Most especially, I need to thank my Georgetown colleague and friend **Larry Solum** for his unstinting support, and for his brilliant insights into the complex legal and tactical issues raised by this challenge, whatever his own views of the matter might have been.

I thank the dozens of reporters I have spoken with over the past two years. I make no secret of the fact that I believe the coverage of these legal challenges was consistently fair, balanced and accurate. I was never misquoted or mischaracterized by a reporter. I never felt our side was given short shrift even as reporters accurately reported the skepticism and even scorn heaped upon our claims. That scorn was a legitimate part of the story. I know some on the left fault the press for heightening the credibility of our challenge by giving us unduly respectful coverage. From this, I not-so-respectfully dissent. The press simply did its job. Well.

Of course, everyone knows that Supreme Court cases are won and lost on the briefing, not oral argument, and the briefs written by the **Jones Day** law firm for the NFIB – especially **Mike Carvin, Greg Katsas**, and **Hashim Mooppan** – and by **Paul Clement** and **Erin Murphy** of **Bancroft LLC** for the state AGs were superb before receiving any input from me. If the case prevails, they deserve every credit and if it fails, no legal team could have done any better. Supreme Court advocates know what academic sometimes seem to forget: You simply can't "mandate" a justice go where he or she does not want to go with a clever argument. All you can do is present your strongest case in the most compelling way. Mike, Greg and Paul did that during oral argument in which the pressure could not have been more intense. I was supremely grateful it was them and not me who had to bear up under the strain last March. Along with **Karen Harned**, director of

the NFIB Small Business Legal Center, win or lose, I believe we fielded the “A Team” on behalf of the majority of the American people who reject the Affordable Care Act and believe it to be unconstitutional.

A special thanks is due to **Todd Gaziano** of the **Heritage Foundation** for asking me in November of 2009 if I wanted to “do something” about the bill that looked like it might emerge from secret deliberations in the Senate, and who recruited a young associate **Nathaniel Stewart** to compose the first draft of a **Legal Memorandum** that became the basis for the initial constitutional arguments against the challenge – arguments that convinced Senate Republicans (who I also thank) to make their point of constitutional order on December 23d, which launched the constitutional difficulties of the ACA into the public arena. Nate deserves far more credit for these arguments than he has received so far. Indeed, as a former prosecutor who never worked for a law firm, my experience working closely with associates like **Joshua Greenberg** in *Raich*, and Nate, Hash and Erin in this case, exposed me to the incredible contributions by unsung law firm associates. Nate, Hash and Erin are three such brilliant lawyers.

Finally, with apologies to all those I could not single out by name, I wish to thank to **our loyal readers** for patiently returning to the scene of the Conspiracy. It is the quality of our readers that making writing for this blog worthwhile. Without our readers, there would be no Conspiracy, so you all have made an important contribution to this case.

Win or lose.