The Washington Post | Ezra Klein's
WONKBLOG

Obamacare's most influential legal critic on Tuesday's oral arguments

Posted by Ezra Klein at 04:52 PM ET, 03/27/2012

Randy Barnett is professor of law at Georgetown University, as well as a senior fellow at the Cato Institute and the Goldwater Institute. He has also been perhaps the key legal thinker developing the case against the Affordable Care Act's individual mandate. We spoke Tuesday afternoon, and a lightly edited transcript follows.

Ezra Klein: What did you see as the key moments in today's oral arguments?

Randy Barnett: There were several major points. Justice Kennedy began the argument by asking — and this somewhat goes to your point — can you create commerce in order to regulate it? That would seem to go beyond the text of the Commerce Clause itself. The second question he posed, and it was dramatic the way he put it, was he asked the solicitor general to assume this was unprecedented, and then said, doesn't that mean you have a heavy burden of justification if you are changing the relationship of a citizen to the government in this way? That was major. He's saying this is a new power.

EK: I'm not an expert, so this may be a stupid question: Is "heavy burden" a technical term for a judge to use? Does it refer to something specific?

RB: It's not. The technical doctrine, which Justice Kennedy mentioned in passing, is that there's presumed constitutionality for laws passed by Congress. What he said was, notwithstanding that doctrine, don't you have a heavy burden of justification?

EK: It also seems like you had a big effect on today's arguments. You're really the originator of the activity/inactivity distinction, and that seemed to dominate some of the discussion today. Can you tell me a bit about the history of this argument?

RB: I don't read the argument that way. The activity/inactivity distinction came up in a couple of different ways at a couple of different points. But I don't think it dominated that argument. But the origin of the distinction I made was in reading original cases around the Commerce Clause. Every one of them discusses the activities the Commerce Clause may reach. So if you look at the previous doctrine as identifying classes of activities, then someone not engaged in activity at all cannot be reached.

EK: Perhaps you can clarify a distinction that escapes me here. It's understood to be constitutional for the government to tax me in order to pay for Medicare, which is a single-payer insurance program that I'll get when I'm over 65. But it's not okay for the government to say I have to self-insure on the private market before I'm 65.

RB: There are several answers, but I'll limit myself to two. First, there's the text of the Constitution itself. The text of the Constitution itself gives Congress the power to levy taxes on people and on income. We can't dispute that. It does not give Congress the power under its commerce power, at least not expressly, to make them do business with private companies.

The second point I would make is that the duty to pay taxes is part of your duty to support the government in return for the protections the government gives you. What the government is claiming here is this power — and this ought to disturb people on the left — to make people do business with private companies when Congress thinks it's convenient.

EK: And how does that fall on something like the Ryan plan, where the government says, look, we'll lower your tax liability by $2,500 if you purchase insurance from private insurers? That seems like the same penalty, the same power, just one step removed.

RB: Most of the justices did not seem all that sympathetic to that argument. Just because the government does have the power to do x, doesn't mean they have the power to do y, even if y has the same effect as x. There's no constitutional principle like that. And by the way, if they have a commerce power to mandate you buy things, then under existing law and financial law, they could put you in jail. Every time you give up a tax subsidy, all you lose is the $5,000 benefit you didn't get. It can't be enforced through imprisonment. And that's a big difference.

EK: One thread of the arguments that seemed interesting was that Justice Breyer basically said the commerce power is very broad. Congress could pass a Medicare insurance program that covered burial costs. It could push people into insuring themselves in that market. The conservatives are looking for a limiting principle here that doesn't really exist for this bill because it hasn't existed in the Court for years. And it often seemed to me that Verrilli's problem was he had to come up with a limiting principle that he didn't really believe and couldn't clearly articulate in order to better target Kennedy. And it seemed at times that Breyer and the other liberals were trying to push Verrilli to just come out and say that.

RB: Justice Breyer definitely argued that. But I'm not sure the other liberal justices adopted that approach.

EK: Any other moments that particularly struck you in the arguments?

RB: One of the moments that was absolutely key was Justice Scalia dealing with his previous opinion in the Raich case. His opinion in the Raich case, which focused on something being essential in the broader regulatory scheme, was all about something being necessary in the Necessary and Proper Clause, not with something being proper. But in other cases, he said, the Supreme Court has held that a certain exercise of federal power might be necessary but might not be proper. Then the solicitor general pushed back and said those cases involved state commandeering. And Scalia said, well, those cases were state commandeering, but that's not the only violation that can be improper. And he pointed to the 10th Amendment, which doesn't just protect the states, but also protects the people.

EK: I took that exchange as evidence that Scalia had thought hard about the arguments saying that Raich meant he had to rule for the individual mandate, and was almost waiting to explain why that wasn't the case.

RB: Yes. He's totally considered it. I can't say if he's rejected it, because I can't speak for any justice, but he understands how different what he did in *Raich* was from what he did in this case. Remember, I was the lawyer in the *Raich* case. He gave me a very hard time that day. So I knew that case, and wasn't happy with how he ruled on it. But I understood exactly the difference between what he did there and what's at issue here.