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The States Fight In the Last Ditch Against Obamacare

By: DAVID CATRON – November 19th, 2012

They could still win if their leaders have the courage to stick to their guns.

Last July, I wrote that the states still had the power to kill Obamacare, despite the Supreme Court's gross dereliction of duty in Florida v. HHS. My point was that the insurance exchanges required by PPACA are the key to its success or failure, and that the law grants the states enormous power in the way they are set up. The ostensible purpose of these exchanges is to provide "marketplaces" where people without health insurance can acquire subsidized coverage. Ironically, the law doesn't actually require states to set up these bureaucracies. Yet, as Sally Pipes and Hal Scherz note, "only state-based exchanges ... may distribute credits and subsidies."

In other words, if the states refuse to set up exchanges, they cut off the subsidies and tax credits that are the lifeblood of Obamacare. Moreover, states that decline to set up these enabling bureaucracies will also be protecting their business communities from job-killing federal penalties -- even if the federal government comes in and sets up its own exchanges in those states. The Cato Institute's Michael Cannon explains, "defaulting to a federal exchange exempts a state's employers from the employer mandate -- a tax of $2,000 per worker per year." This is why more than half of the 50 have opted not to set up state-run exchanges.

Last Friday, three more governors officially announced their refusal to set up state-run Obamacare exchanges. Ohio's John Kasich, Wisconsin's Scott Walker, and Maine's Paul LePage all released statements indicating that they would not assist the Obama administration in its effort to socialize health care in their states. All three governors made their decisions based on the knowledge that, even if they cooperate on the exchanges, they would have little control over how the exchanges are operated. As Cato's Cannon puts it, "[A] state-created exchange is not a state-controlled exchange. All exchanges will be controlled by Washington."

In fact, the grim reality is that Washington won't be content to merely control the exchanges. Federal bureaucrats have already begun rewriting the law when the provisions of the actual statute prove inconvenient. When it became obvious that many states would refuse to create exchanges, the Obama administration decided to funnel tax credits and subsidies through federally-created exchanges, ignoring clear language in the law indicating that such premium-assistance was restricted to state-run exchanges. The IRS recently finalized a regulation signaling its intention to illegally provide premium assistance through federal exchanges.

This outrage prompted the state of Oklahoma to file an amended complaint in the U.S. District Court for the Eastern District of Oklahoma. The state points out that "The State of Oklahoma has exercised its right not to establish an Exchange" and that the provisions of ObamaCare "not only permit the State of Oklahoma to make this policy choice, but also created a mechanism ... by which the State of Oklahoma can put its decision into effect." It goes on to show that "The [IRS] Final Rule renders the mechanism inoperative." In other words, Oklahoma complied with the provisions of the law and now the IRS has illegally ignored those provisions.

Will the Oklahoma lawsuit go anywhere? The June Supreme Court decision on Obamacare, regardless of its surreal aspects, actually offers some hope here. Although the majority in that ruling disappointed many where the individual mandate was concerned, it nonetheless ruled in favor of the plaintiffs on the Medicaid mandate, which the plaintiffs said "commandeered" state authority. This, as it happens, is precisely the reasoning used by Oklahoma regarding the IRS Rule: "[It] commandeers state governmental authority with respect to State Exchanges, permits HHS to exercise a State's legislative and/or executive power."

Meanwhile, HHS has decided to extend the deadline for state governments to declare whether or not they will set up state-based exchanges. The original deadline by which states were to declare their intentions was November 16. Now Kathleen the Terrible has condescended to give them until December 14. The HHS secretary says the extension was prompted by a desire to provide the states with "the flexibility, resources, and technical assistance necessary to help you achieve successful implementation of your state's Exchange." More likely, she wants more time for the arm-twisting and legal skullduggery for which she is justly notorious.

Inside the Beltway, Republicans seem prepared to wave the white flag on Obamacare. Shortly following the election debacle, House Speaker John Boehner declared that "Obamacare is the law of the land." The tsunami of criticism he received pursuant to that ill-considered remark is probably behind the effusive praise he heaped on John Kasich for his decision to opt out of a state-run exchange for Ohio: "I'm proud of my governor for taking a stand and resisting the federal takeover of healthcare in Ohio." And, regardless of Boehner's sincerity or lack thereof, the states are probably our last hope of getting rid of this big-government boondoggle.

So, the long twilight struggle continues. Without its insurance exchanges, the Obamacare scheme simply will not work, but the states are fighting in the last ditch against an increasingly powerful and lawless federal government determined to foist them on us. If the states are bullied into setting up their own exchanges or the IRS gets away with its extralegal rule to fund federal exchanges, we're probably stuck with it. Speaker Boehner's bleak post-election assessment will have been correct after all.