How ObamaCare's Victories Count Against It In Sissel v. HHS

By Michael F. Cannon
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Randy Barnett has an excellent post at the Volokh Conspiracy about his recent *amicus* brief requesting the D.C. Circuit grant *en banc* review of *Sissel v. HHS*. (Sound familiar?) *Sissel* challenges the constitutionality of ObamaCare's individual mandate – which the Supreme Court ruled could *only* be constitutional if imposed under Congress' taxing power – on the grounds that this, ahem, *tax* originated in the Senate rather than the House, as the Constitution's Origination Clause requires.

A three-judge panel of the D.C. Circuit ruled against Sissel. The panel's rationale was that the Patient Protection and Affordable Care Act was not the sort of "Bill[] for raising revenue" that is subject to the Origination Clause, because the purpose of the PPACA is to expand health insurance coverage, not to raise revenue. Barnett explains why this reasoning is nutty. Under the Sissel panel's ruling, no bills would ever be considered revenue measures because all revenue measures ultimately serve some other purpose. The panel's interpretation would therefore effectively write the Origination Clause out of the Constitution. Barnett argues instead that the courts must recognize the PPACA as a revenue measure subject to the Origination Clause because the Supreme Court held the taxing power is *the only way* Congress could have constitutionally enacted that law's individual mandate.

A shorter way to describe Barnett's argument is that he turns ObamaCare supporters' own victory against them: "You say the individual mandate is constitutional only as a tax? Fine. Then it's subject to the Origination Clause."

Barnett again corners the D.C. Circuit with another sauce-for-the-gander argument on the procedural question of whether that court should grant *en banc* review of its panel decision in *Sissel*:

Of course, en banc review is rarely granted by the DC Circuit, but given that it recently granted the government's motion for en banc review of the *statutory interpretation* case of *Halbig v. Burwell* presumably because of the importance of the ACA, the case for correcting a mistaken *constitutional interpretation* is even more important, especially as the panel's reasoning has the effect of completely gutting the Origination Clause from the Constitution…

Or, the shorter version: “You guys think Halbig is worthy of en banc review? Fine. If the Sissel panel erred, the downside is even greater.”

We’ll see whether the D.C. Circuit thinks the Constitution is as worthy of its protection as ObamaCare.

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