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The Case Against ObamaCare

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Introduction

In March 2010, nearly half the states' attorneys general filed suit against the federal government on behalf of their respective states[1] to block key provisions of the Patient Protection and Affordable Care Act (otherwise known as "ObamaCare"). Nineteen AGs partnered with Florida AG Bill McCollum to file suit in the U.S. District Court in the Northern District of Florida while Virginia AG Kenneth Cuccinelli independently filed suit in the District Court in Richmond.

This report details the legal basis for a constitutional challenge of ObamaCare, as well as the arguments by both proponents and opponents of the legislation, their use of case law and legal precedent, and the status of both lawsuits challenging the constitutionality of some of ObamaCare's key provisions.

The central issue in both suits is the constitutionality of Section 1501 of the Act, the Minimum Essential Coverage Provision, commonly known as the "Individual Mandate". The Individual Mandate requires every United States citizen, other than those falling within specified exceptions, to maintain a minimum level of health insurance coverage each month beginning in 2014. Failure to comply will result in a penalty included with the taxpayer's annual return. As enacted, Section 1501 is administered and enforced as a part of the Internal Revenue Code.

The Individual Mandate is the lynchpin of ObamaCare. Without the ability to compel citizens to purchase insurance, the rest of ObamaCare is rendered largely meaningless. While both suits raise other important claims for consideration (like the nature of the previously-mentioned penalty) these claims are subsidiary to the Individual Mandate. Congress' ability to enforce the Individual Mandate depends on the reach of Congress' commerce power pursuant to Art. I, Sect. 8 of the U.S. Constitution.

[1]Virginia; Florida, South Carolina, Nebraska, Texas, Utah, Louisiana, Alabama, Michigan, Colorado, Pennsylvania, Washington, Idaho, South Dakota, Nevada, Arizona, Alaska, Georgia, North Dakota, Indiana, and Mississippi.

The Commerce Power – and Its Limits

The so-called "Commerce Clause" (giving Congress the ability to "regulate commerce . . . among the several states . . .")[2] is one of the most heavily-interpreted provisions of the Constitution and the justification for federal legislation in areas that seemingly have nothing to do with "interstate commerce". Beginning during the New Deal era, the U.S. Supreme Court greatly expanded the interpretation of commerce power, allowing Congress to legislate in areas unknown since the country's founding, with the floodgates being opened wide by the 1942 case of *Wickard v. Filburn*[3].

In *Filburn*, the court upheld the federal government's power under the Agricultural Adjustment Act of 1938 to prevent an Ohio farmer from growing wheat for his own personal consumption, reasoning that because the farmer's wheat-growing activities reduced the amount of wheat he would buy on the open market, and because wheat was bought and sold nationally, the farmer's production "affected" interstate commerce. Note that the farmer had no intention of selling his wheat, either locally or across state lines. Merely *abstaining* from purchasing wheat on the open market – that is, *negative* economic activity - was held to affect commerce so as to trigger federal jurisdiction and regulation.For the next 50 years, federal courts found scant reason to deny Congress the power to regulate - even in areas remote from ordinary commerce - and Congress hasn't been bashful in asserting its control. For instance, the Civil Rights Act of 1964 was based on the commerce power, as was the 2006 Sex Offender Registration and Notification Act and the 1994 Violence Against Women Act. In each case, Congress used *Filburn's* commerce analysis to justify federal legislation in *local* matters.

Beginning in the 1990s, however, the Rehnquist Court began to pull Commerce Clause jurisprudence back to a more conventional connection to actual interstate commerce. In *United States v. Lopez*[4] the Court struck down a provision of the Gun-Free School Zones Act of 1990, holding that merely possessing a gun near a school is not economic activity that has "substantial effect" on interstate commerce. According to Chief Justice Rehnquist, previous cases had held that Congress could regulate (a) the *channels* of interstate commerce, (b) the *instrumentalities* of interstate commerce or *persons or things* in interstate commerce and (c) activities that *substantially affect* or *substantially relate to* interstate commerce. In the court's view, the offending provision did none of these things.

In *United States v. Morrison*[5], the court further clarified the relationship of federal legislation to actual commerce. The Court held that a key provision of the above-mentioned Violence Against Women Act giving sexual assault victims a private federal remedy, even in instances

[2] Article I, Section 8. This same section also gives Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution" the Congress' enumerated powers, which include the commerce power. This is known as the "Necessary and Proper Clause".
[3] 317 U.S. 111 (1942)
[4] 514 U.S. 549 (1995)
[5] 529 U.S. 598 (2000)

where no criminal charges are filed, exceeded the limits of commerce power. Again writing for the majority, Chief Justice Rehnquist stressed that the Constitution conferred onto Congress limited and enumerated powers that Congress clearly exceeded by legislating in areas that had an attenuated effect on commerce. Rehnquist further emphasized that an expansive view of the Commerce Clause must not lead to a blurring of the line between federal and local authority. In the *Morrison* court's view, therefore, the Commerce Clause can only be viewed through the lens of federalism, with distinct limits on federal power.

Does Congress Have the Power to Compel a Purchase?

Both lawsuits challenging the Individual Mandate question whether commerce powers allow Congress to compel citizens to purchase insurance, and whether a citizen's refusal to make such a mandatory purchase affects interstate commerce. These are matters of first impression: Congress has never attempted to force citizens universally to purchase a product or service and no court has ruled on whether *no* economic activity – that is, the refusal to make the required purchase – substantially affects commerce. On December 13, 2010, Judge Henry Hudson of the Eastern District Court of Virginia fired the first shot by holding that the Individual Mandate was unconstitutional on both grounds.

In his memorandum opinion, Judge Hudson carefully analyzed the arguments of the two parties, the State of Virginia and U.S. Secretary of Health and Human Services Kathleen Sebelius. The Secretary asserted a traditional analysis based on *Wickard v. Filburn,* noting that an individual decision to forego insurance coverage is "economic activity" because (a) every person will eventually require medical care and that (b) the "aggregation" of such refusals would affect the ability of the federal government to cover the uninsured and reduce costs for all. Because, in the Secretary's view, Congress *has* the power to reform the interstate insurance market,[6] Congress also has the power under the "Necessary and Proper" clause of Art. 1, Sect. 8 to enact the Individual Mandate.

By contrast, Virginia emphasized the central tenet of jurisdiction under the Commerce Clause – economic activity – and distinguished between the *voluntary* decision to grow wheat in *Wickard v. Filburn* with the *involuntary* act of purchasing mandated insurance. Pointing to the *Lopez* and *Morrison* cases, Virginia argued that the refusal to purchase insurance is not economic "activity" and cannot be penalized by Congress as a "necessary and proper" enforcement of the Individual Mandate of ObamaCare.

Judge Hudson agreed with Virginia, holding that a refusal to purchase insurance is not economic "activity" for Commerce Clause purposes, even if taken in the aggregate across the

[6] A dangerous assumption, according to Randy Barnett of Georgetown University Law Center, who believes that the insurance market is not "commerce" as generally understood by the Founders or the courts before the New Deal era. *See Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional* (available for download at http://ssrn.com/abstract=1680392).

country. As the judge observed, "neither the Supreme Court nor any federal court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market" and that the Individual Mandate is therefore beyond Congress' "necessary and proper" powers.

The court also invalidated the penalty provision of the Individual Mandate on grounds that the assessment – on an individual's tax return – was linked to an unconstitutional exercise of commerce power and was not a genuine "tax" as argued by the Secretary. The "taxing power" arises under the Constitution's "general welfare" clause of Art. I, Sect. 8[7] and must be reasonably related to the generation of revenue in support of the government. As the court noted, Congress itself repeatedly referred to the levy as punishment for non-compliance with the Individual Mandate and therefore it could not be construed as a legitimate revenue-raising measure.

While Judge Roger Vinson in the Florida-based lawsuit has not yet issued an opinion, he expressed considerable skepticism about the Individual Mandate in his 65-page opinion denying the federal government's motion to dismiss most of the AGs' claims.[8] The smart money says that Vinson will rule the same way as Hudson on the constitutionality of the Individual Mandate and related penalty.[9] Regardless of how these and other suits are decided at the trial level, they'll make their way to the U.S. Supreme Court for ultimate decision.

Other Theories

While the state AG lawsuits focus on the commerce and taxing power and – obliquely – the Tenth Amendment[10], several private lawsuits[11] assert other possible claims based on more general issues of personal privacy and autonomy. These possible claims include:

A. Medical Autonomy Under the Fifth and Ninth Amendments. Our rights to medical autonomy – that is, control over our bodies, doctor-patient relationships or medical treatment – are arguably fundamental rights protected by the "liberty guarantees" of the Fifth and Ninth Amendments. The Fifth Amendment protects life, liberty and property and requires due process of law before we can be deprived of any of them. The Ninth Amendment provides that we retain all our natural rights, even though they might not be listed in the Constitution. The Individual Mandate arguably burdens those liberty rights in our intimate and personal relations.

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[7] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"

[8] *Florida ex rel. McCollum v. U.S. Dept of Health and Human Services,* 716 F.Supp.2d 1120 (N.D. Fla. 2010)

[9] In footnote 11 of his opinion in the Virginia case, Judge Hudson blows Judge Vinson a judicial kiss, stating that Vinson "perceptively notes that the [penalty] provision fails to mention any revenue generating purposes".

[10] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[11] Among these is *Coons, et al. v. Geithner, et al.* 10-cv-1714 in the District of Arizona.

B. Privacy Guarantees Under the Fourth, Fifth and Ninth Amendments. This claim asserts that the compulsory transfer of our medical records to insurers under the Individual Mandate violates our Fifth Amendment property rights and our Fourth Amendment privacy rights. The Fourth Amendment provides security in our "persons, houses, papers, and effects" against "unreasonable" search and seizures. The violation occurs when the Individual Mandate forces us to disclose without genuine consent our most private information.

C. State Legislative Autonomy. The Supreme Court has stated that the First Amendment requires legislators be given wide latitude to express their views on policy.[12] Because ObamaCare imposes eligibility and maintenance requirements on states as conditions of receiving further Medicaid funding, and by imposing a variety of other mandates on the states, state legislators' hands, mouths and ability to vote freely are unconstitutionally burdened by the inexorable pressure exerted by ObamaCare.

D. Unconstitutional "Entrenchment". The legislative power of Congress does not include the ability to prevent future Congresses from altering or amending legislation enacted by earlier Congresses. ObamaCare creates a 15-member "Independent Payment Advisory Board" (IPAB) to provide "detailed and specific proposals related to the Medicare program"[13] beginning in 2014, which must include recommendations that will result in the reduction of the per capita rate of growth in Medicare spending. The statute provides for no rulemaking procedure for the IPAB, expressly prohibits either administrative or judicial review of IPAB proposals and restricts the manner in which Congress can debate, amend or vote on IPAB proposals.

Moreover, once an IPAB proposal is submitted to Congress, it can only go to specific House and Senate committees and should the Congress not act on the proposal, it can become law without approval by Congress or by being signed into law by the president. Finally, in order to discontinue IPAB, a Congress must pass a joint resolution according to a rigid formula that may not be introduced until 2017 and no later than February 1, 2017, with enactment to take place by August 15, 2017. Even if enacted, it will not become effective until proposal year 2020. Taken together, these anti-repeal measures amount to an unconstitutional entrenchment and remove legislative power from Congress and give it to unelected and unaccountable bureaucrats.

State Legislation and the Tenth Amendment

Several states have passed legislation purporting to block the federal government's ability to legislate in private decisions to seek health care services, which is nowhere enumerated in the Constitution and therefore reserved to the People under the Tenth Amendment. Under such

[12] *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966)
[13] 42 U.S.C. § 1395kkk(a)

legislation, state legislatures declare as a matter of federal and state constitutional law and public policy that every citizen has the right to obtain whatever health services he chooses, without penalty or threat of penalty and forbids state officials to collect any such penalty.[14]

This is a classic constitutional confrontation based on a renewed and revived reliance on the Ninth and Tenth Amendments[15], asserting state control in all areas not specifically enumerated in the U.S. Constitution. Health care is quintessentially a matter for state regulation under the "police power", the residuum of power retained by the states to regulate in the areas of health, safety, welfare and morals. Historically, the federal government has never been viewed as having any general police power under the Constitution. That is a matter for the states' "general jurisdiction".

Conclusion

ObamaCare is gravely flawed legislation that violates the Constitution at many levels and coerces the American people in ways unimagined by our Founders, while setting up a constitutional confrontation between the Congress and states and people who refuse to comply. We can only hope that it is repealed promptly, whether by Congress, or the Courts.

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[14] *See, e.g.* Arizona (Ariz.Rev.Stat.Ann. § 36-1301 (2010)); Virginia (Virginia Code § 38.2-3430.1:1 (2010)). Rep. Richard Cebra recentlyintroduced ia bill to adopt a similar statutory provision in Maine (LR 67 "An Act Regarding the Federal Patient Protection and Affordable Care Act").

[15] Note that the same New Deal Supreme Court that expanded the reach of the Commerce Clause also dismissed the applicability of the Tenth Amendment, referring to it as a "truism". *United States v. Darby Lumber Co.,* 312 U.S. 100, 123 (1941) ("The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.")