

Good and Bad News About Obamacare Ruling

The ruling by the Supreme Court on ObamaCare is astonishing, to say the least.

First the bad news. By a 5-4 majority the Court upheld Obamacare as a tax under the Taxing and Spending Clause. This is shocking for several reasons. Congress stated in the law that its authority was derived from the Commerce Clause, not the Taxing and Spending Clause. The statute designates the monetary imposition for failure to obtain health insurance as a penalty, not a tax. There are other provisions in the law where Congress intended a tax, like the tax on tanning beds. But, the individual mandate was denominated as a penalty, not a tax. The statute itself says that Congress relied on the Commerce Clause for its authority to pass the law, not the Taxing and Spending Clause.

President Obama said publicly the individual mandate penalty was not a tax. Congress did not promote the mandate as a tax. It would have been politically unpopular to do so, especially when Obama was saying he did not want to raise taxes on the middle class. The arguments in the lower courts were primarily focused on whether Congress had the authority under the Commerce Clause, because it was well-understood that the Department of Justice raised the argument of the Taxing and Spending Clause as a third backup argument. The arguments in the order of preference for the government were Commerce Clause, Necessary and Proper Clause, and Taxing and Spending if all else fails.

At the Supreme Court during six hours of oral argument, there may have been no more than 50 words on whether the mandate was authorized under the Taxing and Spending Clause, and the government's brief was similarly almost silent on this issue.

The argument focused on the Commerce Clause.

Chief Justice Roberts did a huge disservice by siding with the liberal Justices on the tax issue (Kagan, Sotomayor, Breyer, and Ginsburg). Had he been leaning this way, he should have reset the case for oral argument to focus on this specific issue. At least that would have allowed full briefing and oral argument on this issue. But, there was almost no attention paid to the Taxing and Spending Clause. It is incomprehensible why Roberts would not have the case reargued on this point.

The ruling upholding Obamacare now brings into focus the issue of Kagan and her refusal to recuse herself. Had she done so, and I believe she should have recused, the vote on the Taxing and Spending Clause would have been 4-4, with no majority. The case would have then turned on the Commerce Clause in our favor.

Another problem with the Taxing and Spending ruling is that it makes no legal sense. The Anti-Injunction Act (AIA) is a federal law that prevents suits involving taxes until the tax is paid and a refund is sought. Until that time, the courts lack jurisdiction to entertain a challenge to the law. Here, the Court says the AIA does not apply, but it is nevertheless a tax. This is nonsense. If it is a tax, then the AIA applies, and suit could not be brought until the tax is imposed, which will not be until 2015 or thereafter. Until that time, the courts would lack jurisdiction to rule.

Here is the good news. By a 5-4 majority, the Court ruled that Congress lacks the authority under the Commerce Clause to pass the individual mandate. Congress lacks authority to force people to buy health insurance. Congress cannot regulate noncommercial inactivity (failure or refusal to buy health insurance). This is great news, because had ObamaCare been upheld under the Commerce Clause, Congress would have unlimited authority to regulate our lives. Today, Congress could force you to buy health insurance and tomorrow to join a

health club, eat vegetables, or buy the infamous Chevy Volt car. There is good language in the opinion about how Congress lacks such authority, which was the main focus of the case. Roberts sided here with Kennedy, Scalia, Alito, and Thomas.

More good news. President Obama can no longer hide from his tax and spend ideologies. He can no longer say that he does not want to tax the middle class. As 2008 gave us ObamaCare, I think 2012 will take it away. I believe this ruling will activate many Americans to throw out tax and spend politicians and elect financially responsible members of Congress, who will run on the platform of repealing and/or defunding ObamaCare. I believe we will see the repeal and/or defunding of ObamaCare in 2013, with the new Congress.

Repealing or defunding Obamacare will undo this mess, since the case was decided on the Taxing and Spending Clause. That part of the case will not have significant continuing harm once Obamacare is repealed and/or defunded, because passing a future tax is politically unpopular and such legislation must involve a tax, which limits the kind of laws Congress may entertain. In other words, while Congress's authority to tax and spend is quite broad, it cannot force you to do certain activities other than pay the tax. You can be taxed for Medicare/Medicaid, but you cannot be forced to accept such coverage. However, if the Court had upheld Obamacare under the Commerce Clause, you could still repeal or defund the law, but the continuing ill effect of expansive power would remain for future Congresses to use. The authority of Congress to regulate and to force us to act would be unlimited. This is the bullet we dodged with this ruling. Shockingly, there are four Justices on the Court who agree that Congress has such expansive authority. Elections do have consequences.

At the end of the day, this ruling undermines the confidence of the American people in the Supreme Court and the rule of law, but it will energize the grassroots to get involved and vote and will result in new faces in Washington, D.C. We

dodged the Commerce Clause bullet, which would have been disastrous. The ruling is stunning and is a major surprise, but it could have been worse (one more vote and we would have a different America), and we can clean up the mess left by the Court's ruling. That must be our task moving forward.

"One final note: Our case of *Liberty University v. Geithner* will be conferenced at the Supreme Court and sent back to the Fourth Circuit Court of Appeals. We still have the First Amendment Free Exercise argument regarding forced abortion funding. As in all of the recent suits on the HHS mandate over forced abortion funding/insurance, our case has that claim. We will continue to pursue that claim and work to repeal or defund the law."