

FROM: THE VOLOKH CONSPIRACY

SO MUCH FOR THE COMMERCE CLAUSE CHALLENGE TO INDIVIDUAL MANDATE BEING “FRIVOLOUS”

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Remember when the Commerce Clause challenge to the individual insurance mandate was dismissed by all serious and knowledgeable constitutional law professors and Nancy Pelosi as “frivolous”? Well, as Jonathan notes below, the administration is now apparently telling the New York Times that the individual insurance “requirement” and “penalty” is really an exercise of the Tax Power of Congress.

Administration officials say the tax argument is a linchpin of their legal case in defense of the health care overhaul and its individual mandate, now being challenged in court by more than 20 states and several private organizations.

Let that sink in for a moment. If the Commerce Clause claim of power were a slam dunk, as previously alleged, would there be any need now to change or supplement that theory? Maybe the administration lawyers confronted the inconvenient fact that the Commerce Clause has never in history been used to mandate that all Americans enter into a commercial relationship with a private company on pain of a “penalty” enforced by the IRS. So there is no Su-

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preme Court ruling that such a claim of power is constitutional. In short, this claim of power is both factually and judicially unprecedented.

Remarkably, and to its credit, the NYT informs its readers about 2 key facts that pose a problem with the tax theory – and without even attributing these to the measure’s opponents.

Congress anticipated a constitutional challenge to the individual mandate. Accordingly, the law includes 10 detailed findings meant to show that the mandate regulates commercial activity important to the nation’s economy. Nowhere does Congress cite its taxing power as a source of authority.

And

The law describes the levy on the uninsured as a “penalty” rather than a tax.

This is a sign that NYT’s reporter Robert Pear is on the ball. But wait! There is more that is not in the article.

The Supreme Court has defined a tax as having a revenue raising purpose – a requirement that is usually easy to satisfy. But in the section of the act that specifically identifies all of its revenue raising provisions for purposes of scoring its costs (which is a big deal), the insurance mandate “penalty” goes unmentioned.

Unlike any other tax, according to the act, the failure to pay the penalty “shall not be subject to any criminal prosecution or penalty with respect to such failure.” Nor shall the IRS “file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section,” or “levy on any such property with respect to such failure.”

The article reports this response from the Justice Department:

The Justice Department brushes aside the distinction, saying “the statutory label” does not matter. The constitutionality of a tax law depends on “its practical operation,” not the precise form of words used to describe it, the department says, citing a long line of Supreme Court cases.

Now there are cases that say (1) when Congress does not invoke a specific power for a claim of power, the Supreme Court will look

for a basis on which to sustain the measure; (2) when Congress does invoke its Tax power, such a claim is not defeated by showing the measure would be outside its commerce power if enacted as a regulation (though there are some older, never-reversed precedents pointing the other way), and (3) the Courts will not look behind a claim by Congress that a measure is a tax with a revenue raising purpose.

But I have so far seen no case that says (4) when a measure is expressly justified in the statute itself as a regulation of commerce (as the NYT accurately reports), the courts will look behind that characterization during litigation to ask if it could have been justified as a tax, or (5) when Congress fails to include a penalty among all the “revenue producing” measures in a bill, the Court will nevertheless impute a revenue purpose to the measure.

Now, of course, the Supreme Court can always adopt these two additional doctrines. It could decide that any measure passed and justified expressly as a regulation of commerce is constitutional if it could have been enacted as a tax. But if it upholds this act, it would also have to say that Congress can assert any power it wills over individuals so long as it delegates enforcement of the penalty to the IRS. Put another way since every “fine” collects money, the Tax Power gives Congress unlimited power to fine any activity or, as here, inactivity it wishes! (Do you doubt this will be a major line of questioning in oral argument?)

But it gets still worse. For calling this a tax does not change the nature of the “requirement” or mandate that is enforced by the “penalty.” ALL previous cases of taxes upheld (when they may have exceeded the commerce power) involved “taxes” on conduct or activity. None involved taxes on the refusal to engage in conduct. In short, none of these tax cases involved using the Tax Power to impose a mandate.

So, like the invocation of the Commerce Clause, this invocation of the Tax Power is factually and judicially unprecedented. It is yet another unprecedented claim of Congressional power. Only this one is even more sweeping and dangerous than the Commerce Clause theory.

I responded to this theory in the Wall Street Journal back in April, in an op-ed the editors entitled The Insurance Mandate in Peril.¹ Here is a key passage from my op-ed:

Supporters of the mandate cite *U.S. v. Kahriger* (1953), where the Court upheld a punitive tax on gambling by saying that “[u]nless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power.” Yet the Court in *Kahriger* also cited *Bailey* with approval. The key to understanding *Kahriger* is the proposition the Court there rejected: “it is said that Congress, under the *pretense* of exercising its power to tax has attempted to penalize illegal intrastate gambling through the regulatory features of the Act” (emphasis added).

In other words, the Court in *Kahriger* declined to look behind Congress’s assertion that it was exercising its tax power to see whether a measure was really a regulatory penalty. As the Court said in *Sonzinsky v. U.S.* (1937), “[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.” But this principle cuts both ways. Neither will the Court look behind Congress’s inadequate assertion of its commerce power to speculate as to whether a measure was “really” a tax. The Court will read the cards as Congress dealt them.

My piece is not behind a subscription wall so interested readers can read (or reread) the whole thing.

Now the usual caveat. Just because the constitutional challenge to the health insurance mandate is not frivolous does not mean it will prevail. *The odds are always that the Supreme Court will uphold an act of Congress.* Given the wording of the Act, however, the implications of doing so using the Tax Power are so sweeping and dangerous that I doubt a majority of the Court would adopt this claim of power on these facts.

But the argument is far from over. //

¹ Randy E. Barnett, *The Insurance Mandate in Peril: First Congress said it was a regulation of commerce. Now it's supposed to be a tax. Neither claim will survive Supreme Court scrutiny.*, Wall St. J., Apr. 29, 2010, online.wsj.com/article/SB10001424052748704446704575206502199257916.html.