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Strike Down ObamaCare, Says Justice Department

By Sai Prakash and Neal Devins

Twenty states have filed a lawsuit against the federal government arguing that the Affordable Care Act is unconstitutional—and this time the federal government agrees. When the Justice Department filed a brief last week taking the states' side, critics furiously insisted that the failure to defend ObamaCare is a threat to the rule of law. Don’t be moved by selective outrage. This refusal to defend is actually more restrained than President Obama's. And, as before, the courts will decide the ultimate questions.

The new lawsuit, filed in February, arises from a change in the law. The 2017 Tax Cuts and Jobs Act repealed the penalty for failing to purchase health insurance, while leaving in place language to the effect that doing so is mandatory. In 2012 Chief Justice John Roberts held that the individual mandate could pass constitutional muster only by being construed as a tax. Now that the tax is gone, the plaintiff states argue, the mandate must be considered an attempt to regulate commerce. As such, it’s unconstitutional under the views of a five-justice majority in the 2012 case.

The states further argue that other ACA provisions are inextricably linked with the mandate—a view with which four dissenters agreed in 2012 (and on which Chief Justice Roberts has not expressed an opinion).

The Justice Department's filing turns not on some independent executive judgment about the ACA but on a straightforward interpretation of the Supreme Court's 2012 precedent. When Attorney General Jeff Sessions informed Congress of the decision not to defend the ACA, he emphasized that the department's decision will not prevent the courts from ultimately having the last word on the constitutional question.

Contrast this with the Obama administration's 2011 refusal to defend the 1996 Defense of Marriage Act. With no Supreme Court precedent directly on point, the Obama administration independently concluded that DOMA was unconstitutional. That was a far more aggressive stance, but was, in our view, entirely proper: The executive branch has no obligation to defend statutes it believes are unconstitutional. The duty to defend is nowhere found in the Constitution, and the president's power to denounce and frustrate statutes he believes are unconstitutional has a long pedigree. Thomas Jefferson refused even to enforce the Sedition Act, much less defend it.

Judges, not the parties to a lawsuit, will decide for themselves whether the statute is constitutional. In reaching its own judgment, the court can draw from the arguments in filings from states that believe the individual mandate is constitutional. We think that if the court reaches the merits, it will find the mandate unconstitutional because it can no longer be considered a tax.

Whether other ACA requirements are tied to the continued existence of the mandate is a statutory question. The states defending the ACA reject any linkage. They argue that Congress wanted to retain the other provisions of the ACA because it left them in place while repealing the tax penalty. The plaintiffs note the ACA continues to assert that the individual mandate is "essential" to the law’s functioning. As Mr. Sessions noted in his letter to Congress, the Obama administration took that position during the 2012 ACA lawsuit. But it's a more tenuous argument in light of the new law.

It's true that the Trump administration is hostile to the ACA, and the Justice Department's filing can be considered a fallback strategy in the wake of Congress's failure to repeal ObamaCare root and branch. But the same could be said of the Obama administration and DOMA. Unable to persuade Congress to repeal that law, that administration turned to judicial filings and sided with DOMA critics, ultimately finding success at the high court. Judicial filings have long been means both to advance a constitutional vision and to achieve political objectives.

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