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The Volokh Conspiracy and the Health Care Case

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Some posts in this volume have been slightly altered from their original form in order to avoid redundancy, increase clarity, and address issues with hyperlinks. Most of the original hyperlinks have been turned into endnotes.

Foreword

Paul D. Clement

The challenge to the Affordable Care Act (ACA) was a constitutional case like no other. That was true in many respects, but for purposes of this remarkable volume, four are particularly relevant.

First, the arc of the health care case that took it to the Supreme Court was quite unusual. Many great constitutional disputes involving congressional statutes present themselves as such from the very beginning. Take, for example, the constitutional challenge to the McCain-Feingold campaign finance statute, which culminated in the Supreme Court's decision in *McConnell v. FEC*.[1] In that case, the congressional debates were constitutional debates about the meaning, scope, and contemporary relevance of the First Amendment. First Amendment objections—and related policy and political arguments framed in First Amendment terms—had prevented earlier campaign finance proposals from becoming law. And when McCain-Feingold finally passed, First Amendment arguments before Congress transitioned almost seamlessly into First Amendment litigation before the courts. Indeed, the statute itself recognized the reality of imminent First Amendment litigation by including a provision for expedited Supreme Court review. Perhaps as a result, the First Amendment litigation over McCain-Feingold was taken very seriously from the outset.

Not so when it came to the constitutional challenge to the Affordable Care Act. The trajectory of the health care cases was entirely different. While the health care legislation was actively debated in Congress, it was a political and policy debate, not a constitutional one. Legislators hotly contested the wisdom of the individual mandate, but constitutional concerns about the mandate were not raised until the very end of deliberations and were neither central to the debate nor taken particularly seriously.

Thus, when a number of challengers—most prominently a number of states with Republican attorneys general—filed suit and attacked the law as unconstitutional, the challenges were near universally dismissed as frivolous. The suits were seen more as a continuation of the policy debate and derided as political stunts with little realistic prospects of success. Two things changed that: the decisions of two federal district courts and the contributions collected in this volume.

The official game changers were the decisions issued in rapid succession by Judges Henry Hudson of Virginia and Roger Vinson of Florida. Judge Hudson first issued an opinion striking down the individual mandate as unconstitutional.[2] Then in relatively short order, Judge Vinson did Judge Hudson one better and

struck down the health care law in its entirety.[3] Once these Article III judges accepted the arguments against the health care statute, and in one case invalidated it in toto, the challenges could no longer simply be dismissed as frivolous.

But there was an important caveat. While Judges Hudson and Vinson had embraced constitutional challenges to the law, other district court judges rejected similar challenges.[4] And commentators could not help but notice that the judges striking down the statute as unconstitutional were appointed by Republican presidents, while those upholding the law were appointed by Democratic presidents. This disparity received considerable media attention and fueled the perception that the constitutional challenge against the Affordable Care Act was more a matter of politics than a serious constitutional theory.

Enter the *Volokh Conspiracy* (VC). Founded by my friend Eugene Volokh, who clerked for Justice Sandra Day O'Connor the same year I clerked for Justice Antonin Scalia, the *Volokh Conspiracy* had long (at least in Internet terms) been a clearinghouse for serious constitutional analysis of contemporary issues with a particular focus on libertarian and conservative views. But if ever a legal blog and a constitutional moment were meant for each other, it was the *Volokh Conspiracy* and the challenge to the Affordable Care Act. Precisely because the constitutional challenge to the law came in like a lamb and not a lion and precisely because many were eager to dismiss the challenge as a political device rather than the manifestation of a serious constitutional theory, there was a need for pointed constitutional analysis and for voices ready to counter the cacophony of skepticism. And this need arose over and again.

Thus, the second distinguishing aspect of the health care case was the intensity and duration of the media focus. Unlike some of the contributors to the *Volokh Conspiracy*, I was not present at the creation of the case. I did not become involved until Judge Vinson's decision reached the court of appeals. By then, the challenge had grown to include over half the states in the Union. In the interview with members of the steering committee, I mentioned that I had experience with earlier high-profile cases involving everything from campaign finance to the war on terror to issues of race. Little did I know that the coverage of the health care case would eclipse all those other high-profile matters.

In many ways, the health care case was the perfect storm for media coverage. The impact on the economy in general and the health care sector in particular were undeniable. As a consequence, the press corps covering medicine, health care, and business issues were fully engaged in the case. In addition, for the talented corps of reporters who cover the Supreme Court, the health care case was a temporary reversal of fortune. In most outlets, Supreme Court reporters generally seem to have to fight for a few column inches to cover momentous cases. With the health care case, by contrast, editors seemed to have an almost insatiable appetite for stories exploring any angle. And, finally, there were the political reporters fascinated by the dynamic of the president's signature legislative accomplishment being evaluated by the Supreme Court in the midst of a reelection campaign.

This continual attention on the case from a still mostly skeptical media corps created an unprecedented need for continuing constitutional commentary. In most cases, the constitutional debate is confined to the briefs and perhaps a few

blog entries. And generally speaking, even a substantial constitutional case engenders coverage at the time of argument and the time of decision, and that is it. But with the health care case, every decision by multiple courts as the issue made its way to the Supreme Court, and every filing in the Supreme Court, engendered substantial commentary, criticism, and rebuttal. And the most penetrating of that continuing commentary is collected in this volume.

Third and relatedly, the health care case captured the public imagination like no other case in recent memory. Whether because of the saturation coverage, the political dynamic, the practical impact, or something else, many people who had never paid significant attention to a constitutional case were riveted by this one. As a result, the stakes could not have been higher. The case went beyond the precise issues before the Court to implicate the general public's confidence in the legal system as a whole.

Thus, the attention placed on the party of the president appointing the district court judges deciding the health care cases created the real prospect of the public viewing constitutional adjudication as nothing more than politics by other means. The seriousness and timeliness of the constitutional analysis collected here helped provide an antidote to that, as did the courts of appeals, where the results necessitated a more nuanced narrative. A number of prominent appellate court judges appointed by Republican presidents, such as Laurence Silberman of the D.C. Circuit and Jeffrey Sutton of the Sixth Circuit, voted to uphold the statute. But at roughly the same time, Judge Frank Hull, an appointee of President Clinton, was one of two Eleventh Circuit judges to strike down the law in the challenge brought by Florida and a growing number of states. The *Volokh Conspiracy* was there to discuss all of these developments in virtually real time and to emphasize that this more complicated pattern of judicial decisions both underscored the seriousness of the challenge and demanded a more nuanced discussion of the relationship between judicial philosophy and the political party of an appointing president.

Finally, the constitutional stakes in the health care case were and remain critically important. Much of the focus in the immediate aftermath of the decision understandably emphasized the chief justice's analysis of the taxing power and the practical reality that, although there were four votes to do so, the Court's majority did not invalidate the law in toto. But that should not obscure the reality that there are five votes to invalidate the mandate as exceeding Congress's power under the Commerce and Necessary and Proper Clauses, and a remarkable seven votes holding that the Medicaid expansion exceeded Congress's spending power.

When the case began, there were confident predictions that there would be seven or eight votes against the Commerce Clause challenge. Even on the eve of argument, seasoned commentators were still insisting that the constitutional challenge was frivolous. And these predictions were not merely wishful thinking. It was far from obvious that the new appointees of President George W. Bush would have the same enthusiasm for federalism as the justices they replaced. While former Chief Justice William Rehnquist and especially Justice O'Connor cut their teeth in the state courts and in state politics, both Chief Justice John Roberts and Justice Samuel Alito had their formative experiences in the executive branch of the federal government. There was a palpable sense in some circles that the health care case

could be the swan song for the federalism revival—marking the end of one of the signal doctrinal achievements of the Rehnquist Court.

Thus, the Court's decision was an important constitutional moment because it underscored the Court's continued willingness to pursue its ongoing project of identifying judicially enforceable limits on Congress's power. The comments collected in this volume are critically important to understanding that constitutional moment—in terms of both why it happened and what it means. The Constitution had its Federalist Papers, and the challenge to the Affordable Care Act had the *Volokh Conspiracy*.

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Notes

1. McConnell v. FEC, 540 U.S. 93 (2003).
2. Virginia v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010).
3. Florida v. U.S. Dep't. of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011).
4. See, e.g., Liberty Univ. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

Acknowledgments

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