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Cato Institute: Individual Mandate is Unconstitutional

In a recent video produced by the Cato Institute, attorney David Rivkin (picture, left) declared that the individual mandate of ObamaCare is unconstitutional. He described that particular provision of the year-old health care law as violative of "centuries of settled case law," and as "fundamentally different from every law regulating commerce that Congress has ever enacted since the the first days of our Republic."

Rivkin's position on this issue is not surprising. Rivkin is the lead attorney for the state of Florida in its case against the Obama administration. Florida's suit seeks to enjoin several agencies of the federal government from enforcing key provisions of the Patient Protection and Affordable Care Act, known as ObamaCare.

In his very eloquent exposition of constitutional jurisprudence, Rivkin avers that if ObamaCare were to be adjudged constitutional, then "much of the Framers' drafting of the original Constitution, and of the Bill of Rights, and all of Congress's subsequent legislative work in the centuries hence, is at best largely incoherent and at worst, superfluous."

Rivkin goes on to brand the individual mandate as the "single most unconstitutional piece of statutory language in our history." That's quite an indictment given the size of the dossier of unconstitutional statutes enacted by the legislative branch over the past one hundred years or so.

According to Rivkin's interpretation of the Obama administration's defense of the mandate, the individual mandate is constitutionally sound because it forces people to engage in commerce, then it regulates the engagement and after all, the regulation of commerce is well within Congress's constitutional authority.

This baffling chain of reasoning reminds one of the old joke about how the government breaks your leg then gives you a free pair of crutches and says, "See, without us you wouldn't be able to walk."

In his eleven-minute discourse, Rivkin spends most of the time deconstructing the Obama administration's interpretation of the Commerce Clause and the Necessary and Proper Clause. According to Rivkin, the reliance by Congress on these clauses violates the Constitution in several key ways, chief among which is that it "eviscerates the core architectural principle of dual sovereignty."

This co-existence of two equal sovereignties is known as federalism. Essentially, federalism is the structure wherein the federal government is given very limited, enumerated powers and all powers not so enumerated are retained by the states and the people. Any exercise of power by the federal government beyond those specifically granted to it by the Constitution is of null effect and void.

As to how those powers are divvied up, the words of James Madison are instructive:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. (*Federalist* #45)

If this crucial support is removed from the framework of the Constitution, then the entire rest of the document is illogical, as no definition of power or limits thereon would be necessary as all powers could be assumed by the federal government on the basis of their being a logical derivative of some other power (commerce, general welfare, necessary and proper, etc.).

For its part, the federal government more or less adheres to that assertion and that way of thinking. In the algebra of usurpation, if a=b and b=c, then a=anything they say it is.

For example, with regard to the individual mandate portion of ObamaCare, the federal government argues that not doing something is the same as doing something and that if enough people don't do something, then that inaction is linked together and exerts a cumulative effect on commerce. As it touches and concerns commerce, it may, therefore, be rightly regulated by Congress under the terms of the Commerce Clause.

So, by forcing someone to act (in this case, buy a qualifying health insurance policy), the federal government is usurping the force of police power which is exclusively the domain of the sovereign states.

Using this line of reasoning, the federal government can regulate all activity, as well as all inactivity, thus effectively eliminating all limits on its power.

Finally, Rivkin states that the mandate to purchase a health insurance policy is justified by its proponents as a way of lowering the overall cost of health care in this country. This is, they insist, accomplished by eliminating what is known as cost-shifting. Cost-shifting, so the argument goes, is the additional charges incurred by one class (those with health insurance) to cover the economic loss suffered when charges are avoided by another class (the uninsured).

If we accept that this cost-shifting harms commerce and therefore it must be regulated by Congress in order to prevent future economic hardship, then what could Congress, by the same logic, not regulate?

That is, what would stop Congress from enacting a roster of harm-reducing mandates that would ostensibly promote and protect commerce by making sure the haves don't pay for the have-nots? Could they order us to join a gym? Could they require that certain foods be purchased and consumed? Could they mandate that everyone who works within so many miles of their place of employment walk to work?

Rivkin's final word on the subject makes his thoughts on the matter of future mandates perfectly clear: "Congress will find other crises in the future that would demand their intervention."