Written by **Joe Wolverton, II, J.D.** on September 25, 2013

Sen. Mike Lee: Supreme Court ObamaCare Ruling a "Lawless Act"

Minutes after midnight on Wednesday, Senator Mike Lee (R-Utah) rose to give his colleague Senator Ted Cruz (R-Texas) a breather from what was already a marathon speech warning of the "train wreck" that is resulting from the collision of the American economy with the oppression of ObamaCare.

While the remarks delivered by both men were eloquent, engaging, and educational, Senator Lee's impromptu descant on the unconstitutionality of the Supreme Court's rewriting of the original healthcare legislation was particularly noteworthy.

For nearly an hour and without a teleprompter, Senator Lee rightly accused the Supreme Court of having "rewritten" ObamaCare, converting it from a penalty into a tax, thus placing it, as Senator Cruz said, "in a different stream of jurisprudence."

Parenthetically, one wonders if "former law professor" Barack Obama could have stood for nearly an hour in the middle of the night and delivered an unrehearsed lecture on the Constitution without the use of a teleprompter.

Speaking of the court's ruling last year on the constitutionality of the Affordable Care Act, Senator Lee said, "Those five lawyers wearing black robes, who we call justices, were no more empowered than the queen of England to impose a tax on the American people."

"This was a lawless act," he added.

It was indisputably a lawless act of unconstitutional lawmaking on the part of the black-robed oligarchy.

Chief Justice Roberts, writing for the court, held while the "individual mandate is not a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause," it is valid as an exercise of the taxing power granted the federal government by the Constitution.

In her partial dissent, Justice Ruth Bader Ginsberg disagrees with the Chief Justice's interpretation of the constitutional limits of the Commerce Clause. Ginsberg writes:

> When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Cf. Raich, 545 U. S., at 9; Wickard, 317 U. S., at 127–129. Yet no one would offer the "hypothetical and unreal possibilit[y]," Pullman Co. v. Knott, 235 U. S. 23, 26 (1914), of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods.

Ginsberg, therefore, believes that concerned citizens and constitutionalists should not worry about the future imposition of a "vegetarian state" because it's just "hypothetical." That isn't to say, however, that Congress couldn't make such a mandate under its broad Commerce Clause power, she insists.

Furthermore, don't be fooled by the chief justice's more narrow reading of the Commerce Clause. While he rightly reasons that Congress' power to regulate commerce is limited and not intended to place all behavior within the power of Congress to control, his analysis of the individual mandate as an expression of the taxing power makes it clear that the taxation clause gives Congress that immense and unlimited power, even if the Commerce Clause does not.

Then, lest anyone misunderstand exactly what will now be required under ObamaCare, the court declared: "The most straightforward reading of the individual mandate is that it commands individuals to purchase insurance."

Your federal overlords now command you to purchase a qualifying healthcare plan and will impose an additional tax should you refuse to obey.

In a fair reading of the decision, the Supreme Court says that the penalty for failure to purchase healthcare insurance is not a tax for the purpose of the application of the Anti-Injunction Act, but it is a tax for the purpose of interpreting the taxing power of the Constitution. The relevant portion of the majority opinion reads:

> The Affordable Care Act describes the payment as a "penalty," not a "tax." That label cannot control whether the payment is a tax for purposes of the Constitution, but it does determine the application of the Anti-Injunction Act. The Anti-Injunction Act therefore does not bar this suit.

The reasoning upholding the individual mandate as a tax expressly contradicts President Obama's public defense of his pet legislation. In an interview with George Stephanopoulos of ABC News in 2009, President Obama adamantly denied that the individual mandate was a tax. "I absolutely reject that notion," the president said.

One doubts, however, that the president will quibble now over the labels. A penalty or a tax, ObamaCare is unconstitutional regardless of how many "lawyers in black robes who we call justices" say otherwise.

Later, Chief Justice Roberts displays a deplorable disregard for principles of freedom and individual liberty. In his opinion, Chief Justice Roberts wrote, "Neither the Affordable Care Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." That's it. The chief justice of the Supreme Court is telling Americans that having to pay the IRS a tax penalty for not buying a health insurance policy is no big deal and not a "negative legal consequence."

One practical effect of the ruling is that by removing the ObamaCare scheme from its safe and secure Commerce Clause mooring, the Supreme Court has rewritten the law and converted the individual mandate into a tax, thus placing it within the authority of Congress to define. This is the "different stream of jurisprudence" referred to Wednesday morning by Senator Cruz.

This is judicial activism at its finest. The Supreme Court was so determined to endow the federal government with unlimited power and to toss the notion of enumerated powers onto the scrap heap of history that it was willing to effect a fundamental change to the law as enacted by Congress and the president.

As Justice Antonin Scalia wrote in his dissent:

> For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been

> popular, see, e.g., Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, §7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 "defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue."

Senator Lee called it correctly, saying that it was an open and hostile violation of the Constitution's separation of powers for the U.S. Supreme Court to not only rewrite ObamaCare, but to simultaneously unite the power of making and interpreting law into their own unelected hands.

"This was a sad, shameful moment when the Supreme Court of the United States took upon itself the mantle of a super-legislative body, which it is not!" the senator declared.

It certainly is not, but as it stands now, the people's representatives may presume to pass laws in accordance with their constitutionally enumerated powers, but if the Supreme Court wishes to rubber stamp the president's pronouncements and paint them with the color of law, the justices will simply substitute language permitting any imaginable act of despotism in open defiance of any congressional intent to the contrary.

As Senator Lee explained so ably in the pre-dawn hours on September 25, ObamaCare and the Supreme Court decision that simultaneously voided its language and validated its existence denigrates the very principle of personal liberty that is at the core of our constitutional Republic. If Congress and the courts are permitted to envelope the iron fist of absolutism within the velvet glove of the Commerce Clause, then there is nothing that will not fall within that purview.

Does anyone doubt that possessed of this immense power, future legislatures and future justices will demand that Americans purchase (or not) this or that item or service that they deem beneficial (or detrimental) to the free flow of commerce? Green initiatives will mandate the purchase of solar panels, electric cars, etc. Information technology laws will order us under penalty of law to wire our homes with high-speed Internet. Children will be brainwashed by government agents teaching government propaganda in government controlled schools propounding government-mandated curricula.

It is now as Thomas Jefferson feared:

> At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance.

There is no end to the lengths the federal government will go to control our lives if we, the people, do not halt the advance and demand that the national government retreat within the borders of power drawn by our Founding Fathers in the Constitution.

Photo of Sen. Mike Lee: AP Images

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