Written by **Joe Wolverton, II, J.D.** on May 12, 2010

States' Suit Against ObamaCare: Miles to Go to the Supreme Court

As has been faithfully chronicled by The New American, the attorneys general of 20 states have joined as plaintiffs in a lawsuit aimed at scuppering ObamaCare and having various of its most noxious provisions (most notably the individual mandate) declared unconstitutional.

While there are other, perhaps more advisable, ways to skin this cat, these top cops have decided to pursue their goals through litigation in federal court. Many of those supporting the attorneys general hope that the case will wend its way up from the Northern District of Florida to the highest court in the land, thus settling the dispute once and for all. Many less friendly observers reluctantly admit that such a scenario is likely to play out eventually, though just as likely is at least a two-year wait before Chief Justice Roberts and his colleagues would hear oral arguments.

According to the Justice Department (the agency responsible for defending the United States in court), in the nearly two months since President Obama signed the Patient Protection and Affordable Care Act into law, there have been at least a dozen legal challenges to its constitutionality filed in various federal district courts. The case in Florida mentioned above has drawn the most attention, as it is the case that appears to have legs strong enough to run the long, twisted course of federal procedure and win the race to the Supreme Court. There are several intangible factors that augur favorably for the plaintiffs. One of the most notable is the venue in which it will be heard.

While the lawsuit procedurally could have been filed in any federal district court, the plaintiffs chose a district where any appeal would be heard by the 11th Circuit Court of Appeals, a bench regarded as more conservative than many of its sister appellate courts. This was a calculated move by the attorneys general as they undoubtedly wish to remove as many hurdles as possible from the track to certiorari.

Sympathetic judges notwithstanding, the real power of the lawsuit filed in Florida by the attorneys general is found in its central argument. The complaint avers that in passing the ObamaCare statutes, the federal government (the legislative and executive branches) exceeded its constitutional authority and therefore the law is of no legal effect. The precision craftsmanship of the complaint has even some liberal legal minds musing about the possibility of a decision in favor of the states.

The fulcrum upon which the matter turns is whether or not Congress may regulate inactivity — that is to say, no one would argue that Article 1, Section 8 of the Constitution authorizes Congress to regulate

activity (interstate commerce), but doesn't the principle of enumerated and reserved powers as set forth in the Ninth and Tenth Amendments, therefore prohibit Congress from attempting to regulate anything else?

The case at bar specifically impugns the so-called individual mandate. This provision of ObamaCare requires every American, regardless of income or personal preference, to purchase a qualifying health insurance policy or face tax penalties. If the power to regulate commerce or impose taxes is broad enough to justify this provision, then is there anything that would lie outside the boundaries of that power? Congress, theoretically, could compel citizens upon penalty of law to purchase any number of imaginable commodities and thus it would be "extending the sphere of its activity and drawing all power into its impetuous vortex," just as James Madison foretold.

The first named Plaintiff in the lawsuit is Florida Attorney General, Bill McCollum (photo, above left). Mr. McCollum is running for Governor of Florida and has thus exposed himself to charges of political expediency and pandering. For his part, McCollum cites the Constitution's limitations on the power of Congress to regulate commerce and ObamaCare's disregard thereof.

"In the last 50 years or so," Mr. McCollum said, "other than *Brown v. Board*, I think the constitutional precedents here will have a greater impact on more people than maybe anything else the court has decided."

The respondents in the case through the Justice Department have promised to "vigorously defend" the cases. "We are confident that this statute is constitutional and that we will prevail," said Tracy Schmaler, a department spokeswoman

Those familiar with the behind-the-scenes fashioning of the bills in question assert that their handiwork is airtight and impervious to constitutional challenges. They inserted as often as possible clauses referring to the measure's effect on "interstate commerce," thus attempting to disguise their allegedly unprecedented and unconstitutional power grab in the armorial garb of Article 1.

Furthermore, the authors and editors of the ObamaCare package were careful to label any penalties imposed for violations of the new law "excise taxes," for the laying of such taxes are specifically mentioned in the Constitution, thus ostensibly impregnable to a constitutional attack.

Regardless of the national government's attempts to barricade ObamaCare behind walls of constitutional keywords, there is a broad consensus that the law will be heard (eventually) by the Supreme Court. Roger Vinson, the judge hearing the case in Pensacola, has notified the parties of the procedural schedule in the case and oral arguments will begin on September 14, three days before the anniversary of the signing of the Constitution in Philadelphia in 1787. Essentially, as the case is not being filed based on an individual's claim to damages caused by the mandate, the arguments will be probably consist of the federal government's motion to dismiss for lack of standing and the states' opposition to that motion.

The attempt by the attorneys general to thwart the ham-fisted imposition of ObamaCare onto the states is certainly laudable, there may be another more recommendable means of forcefully disgorging Congress of the sovereignty that should be naturally enjoyed by the states and the people.

Nullification is a constitutionally sound and procedurally cleaner method of checking Congress's usurpation of power. Put simply, nullification requires each state to nullify, or invalidate, any federal law that a state believes violates constitutional restrictions on federal power and/or unlawful encroachments into the sovereignty of the states in violation of the Tenth Amendment.

Nullification is based on the argument that as the union was formed by the consent of the several sovereign states, these states as parties to the compact and the authors thereof, retain ultimate authority as to the limits of the power of the central government to enact laws that are applicable to the states and the citizens thereof. The Ninth and Tenth Amendments validate and buttress this assertion.

It behooves every American who delights in the freedoms protected by the Constitution to follow and support the efforts of the states to defend the once impregnable borders of state and popular sovereignty. These courageous acts will have lasting impact on the continued enjoyment of liberty not only for ourselves but for our posterity. We, the People, must manfully assert our rightful place as sovereigns in this Republic and do all within our power to hasten the retreat of the federal government back within the limits drawn for it by our Founding Fathers.

Photo: Florida Attorney General, Bill McCollum: AP Images