



Avik Roy, Contributor

The Apothecary is a blog about health-care and entitlement reform.

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Obama Administration: Obamacare's Individual Mandate 'Is a Tax'

There's been a big dust-up in the media this week as to whether or not Republicans agree with Supreme Court Chief Justice John Roberts that Obamacare's individual mandate is a tax. What the media didn't tell you is that John Roberts didn't invent this argument. Indeed, he learned it from...**President Obama, whose lawyers have argued all along, in court, that the individual mandate is a tax.** It's particularly notable, given the fact that candidate Obama, in 2008, swore up and down that he wouldn't raise taxes on middle-class Americans.



IRS building on Constitution Avenue in Washington, D.C.. (Photo credit: Wikipedia)

There are dozens of examples, all on-line and on the record. Because I like to think I have a life, I'll only pull up a representative sample of them. The argument that the **Obama administration made repeatedly in court was that the individual mandate was a tax, and that the Anti-Injunction Act of 1867 forbids lawsuits against taxes that have not yet gone into effect.** Indeed, the administration won on these grounds in the Fourth Circuit Court of Appeals, where a three-judge panel **vacated and remanded** two Obamacare challenges: *Virginia v. Sebelius* and *Liberty v. Geithner*.

Obama in the Fourth Circuit

Here's how Acting Solicitor General Neal Katyal put it in his [February 2011 brief](#) to the Fourth Circuit in *Virginia v. Sebelius* (p. 36): "The minimum coverage provision," that is, the individual mandate, is **"independently authorized by Congress's taxing power...The minimum coverage provision appears in the Internal Revenue Code and operates as a tax.** It is projected to raise billions of dollars in revenue each year."

He reiterates this point later in the brief (p. 72): "The practical operation of the provision **is a tax.** Individuals who are not required to file income tax returns for a given year are not required to pay the penalty...The amount of any penalty is calculated in part by reference to household income for federal income tax purposes; it is reported on the individual's federal income tax return for the taxable year and **is assessed and collected in the same manner as certain other federal tax penalties...**In short, the minimum coverage provision **is a tax in both administration and effect.**"

Katyal makes the point repeatedly in his [reply brief](#) in the same case. "The minimum coverage provision **operates as a tax** and will produce billions of dollars in annual revenue," he declares on page 46. "There is no doubt that the 'practical operation' of the minimum coverage provision **is as a tax.**" Katyal notes (p. 52) that "the taxing power was expressly invoked in the Senate to defeat constitutional points of order against the minimum coverage provision...And during the legislative debates, congressional leaders defended the provision as an exercise of the taxing power."

Obama in the Eleventh Circuit

So that's *Virginia v. Sebelius*. How about *Florida v. HHS*, the case that made

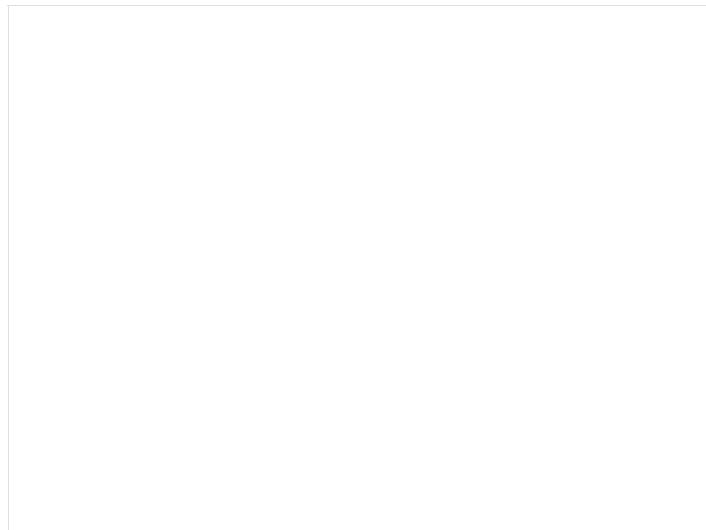
it to the Supreme Court? Katyal said pretty much the same things in his [brief](#) in that case (p. 21): “The minimum coverage provision is also independently authorized under Congress’s taxing power...**The provision thus operates as a tax**, and it is projected to raise billions of dollars in revenue each year.”

Again echoing his arguments in *Virginia v. Sebelius*, he writes (p. 50): “The ‘practical operation’ of the minimum coverage provision **is as a tax**...Congress plainly did not conceal the fact that the provision operates as a tax...Congress placed the provision in the Internal Revenue Code and required that payment be included on individual income tax returns, an entirely transparent approach. Moreover...congressional leaders defended it as an exercise of the taxing power...In short, the minimum coverage provision **is a tax in both administration and effect.**” Katyal reiterated these points in [oral argument](#).

Obama at the Supreme Court

For the Supreme Court proceedings, Solicitor General Donald Verrilli’s [brief](#) on the legality of the individual mandate makes the point again and again. “Congress assigned **adverse tax consequences** to the alternative of self-insuring,” writes Verrilli (p. 11). “Congress’ taxing power provides an independent ground to uphold the minimum coverage provision...**The only consequences of a failure to maintain minimum coverage are tax consequences**” (p. 20). “The minimum coverage provision **operates as a tax law**” (p. 52). “It is fully integrated into the tax system, will raise substantial revenue, and **triggers only tax consequences for non-compliance.**”

P. 53: “The Act imposes reporting requirements on health insurance providers that will **assist the IRS in identifying non-compliant taxpayers**...the IRS may employ offsets against federal tax refunds...In short, the minimum coverage provision will plainly be ‘productive of some revenue’ and thus **satisfies a key attribute of taxation**...The minimum coverage provision is valid **not only as a tax in its own right, but also as an adjunct to the income tax.**”



Finally, here’s Verilli making the same point at [oral argument](#) before the Supreme Court in March: “The legislative history is replete with members of Congress explaining that this law is constitutional as an exercise of the taxing power...Not only is it fair to read this as an exercise of the tax power, **but this Court has an obligation to construe it as an exercise of the tax power**, if it can be upheld on that basis.” (h/t [Noah Glyn](#) for the video.)

Justice Alito asked: “Can the mandate be viewed as a tax if it does impose a requirement on people who are not subject to the penalty or the tax?”
Verrilli: “I think it could.”

The prosecution rests.

Obamacare’s litany of tax hikes

In one sense, all of this is a sideshow. Whether you think the mandate is a tax or a penalty—I agree with Scalia, Alito, Kennedy, and Thomas that it is a penalty—**Obamacare raises over \$500 billion in taxes in its first ten years.** Here, courtesy of [Americans for Tax Reform](#), is the full list:

- **3.8% surtax on investment income (\$123 billion)**
- **Increase in Medicare payroll tax (\$86 billion)**
- **Individual mandate and employer mandate (\$65 billion)**

- Health insurance premium tax (\$60 billion)
- “Cadillac tax” on expensive health plans (\$32 billion)
- Tax on “black liquor” bio-fuel (\$24 billion)
- Pharmaceutical excise tax (\$22 billion)
- Medical device excise tax (\$20 billion)
- Tax on high medical bills (\$15 billion)
- Cap on flexible spending accounts (\$13 billion)
- Ban on using health savings accounts for over-the-counter medicines (\$5 billion)
- Elimination of tax deduction for employer-sponsored retiree drug coverage (\$5 billion)
- Allowing IRS to disallow certain legal tax deductions (\$5 billion)
- “Snooki tax” on indoor tanning services (\$3 billion)
- HSA withdrawal tax hike (\$1 billion)
- Health insurance executive compensation tax (\$1 billion)
- Blue Cross/Blue Shield MLR tax (\$0.4 billion)

Many of these taxes—especially those on insurance premiums, pharmaceuticals, medical devices, and HSA/FSA accounts will fall directly on the middle class. In other words, Obama violated his tax pledge to the middle class, whatever he claims to think about the individual mandate.

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