

# The Fifth Circuit Considers Disconnecting 'Obamacare' from Life Support

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In New Orleans, the birthplace of jazz and creole cuisine, the U.S. Court of Appeals for the Fifth Circuit presides over the States of Texas, Louisiana, and Mississippi. AAPS has been in this Court many times over the years, during which the Court's political composition has drifted from conservative to somewhat liberal to back to conservative today with five new judges picked by President Trump.

Its historic courthouse is named after John Minor Wisdom, who was a judge on this Court for many years, having a name that is ironic in light of his position. Unfortunately, the Fifth Circuit has a tradition of ruling for hospitals virtually every time in peer review cases, but is not as pro-government as its Eleventh Circuit counterpart in Atlanta, where an experienced attorney commented that he has never seen the government lose an appeal.

On the hot summer day of Jul 9, 2019, the Fifth Circuit was tasked with hearing an appeal on the constitutionality of "Obamacare," officially the Patient Protection and Affordable Care Act or ACA. Enacted by Congress in 2010, and signed into law amid great fanfare by President Barack Obama, ACA was thought by some to be a big step for man, and an even bigger step towards an ultimate single-payer system.

AAPS sued, and sued again, to avert this catastrophic Hurricane Katrina to the practice of private medicine. Our legal work included challenging the constitutionality of ACA under the Commerce Clause of the Constitution, under its Origination Clause, and as a violation of separation of powers. Along the way, AAPS helped educate many, and we never stopped trying, because we knew this train was steaming towards disaster.

The U.S. Supreme Court ducked the Origination Clause challenges, and the Courts of Appeals were unwilling to toss out ACA for originating in the Senate rather than the House, contrary to Article I, Section 7, clause 1. Once the U.S. Supreme Court, by the narrowest of margins, embraced ACA in 2012, it appeared to many that this case was closed. Chief Justice John Roberts provided the tie-breaking vote to uphold the constitutionality of ACA, not under the Commerce Clause, which does not permit it, but as a tax based on the Individual Mandate. In what he may have thought to be clever, he hoisted legislation never intended to be upheld as a tax onto its petard of the Individual Mandate, which taxed those who do not purchase health insurance. If everyone purchases it, there is no tax, but let's not quibble about that incoherence in the reasoning, Roberts apparently felt. ACA became the medicine for America, to close her eyes and gulp it no matter how awful it tastes.

It tasted awful indeed. It failed in the marketplace as Big

Insurance skimmed record-breaking profits for themselves, and left taxpayers stuck funding immense subsidies for relatively few. Costly mandates drove up the price of insurance for everyone, such that ACA barely made a long-term dent in the numbers of the uninsured. Politically, ACA became an albatross around the necks of those who supported it, leading to stunning losses by the Democrat Party in 2010 and 2016.

In 2017, Republicans gained control of Congress and the White House, and zeroed out the "tax" that was propping up ACA under Roberts's contrived reasoning. The petard that was hoisting the monstrosity was thereby removed. Voiding the tax should have sent ACA to the political graveyard as one of the most spectacular legislative failures in history. R.I.P.

But as Shakespeare famously observed, "The evil that men do lives after them; the good is oft interred with their bones." There ACA still is, continuing to wreak havoc long after it was chopped down. During a nationally televised debate on July 31, 2019, Democrats contending for the presidential nomination criticized ACA, to the shock of Obama supporters. Several said that ACA did not go far enough. Where is the Constitution when we need it?

Back to that hot summer day in the historic Fifth Circuit courtroom in New Orleans, before a three-judge panel. One of the presiding judges was nominated by George W. Bush, another by Donald Trump, and the third by Jimmy Carter. Yes, Jimmy Carter, who was voted out of office in a landslide nearly 40 years ago but whose influence seems nearly eternal through his appointments to the federal bench.

The parties before the Court included the Trump Administration, through the Department of Justice, a group of 18 "red" States led by Texas (Wisconsin pulled out when Republican Scott Walker was defeated by a Democrat for governor in last November's election), and two individuals represented by the Texas Public Policy Foundation. On the other side, trying to perpetuate ACA, was a group of 21 mostly "blue" States led by California, and also the House of Representatives led by Speaker Nancy Pelosi.

At issue on appeal was a splendid decision by district court Judge Reed O'Connor of the Northern District of Texas (which covers Dallas). Judge O'Connor had invalidated all of ACA for no longer being a tax and for lacking a severability clause to salvage any of it. He took Chief Justice Roberts at his word, such that the only constitutional justification for ACA was the taxation through the Individual Mandate. Voiding that tax meant ending the constitutionality of ACA. Judge O'Connor then issued a stay to delay the effectiveness of his decision until it could be reviewed on appeal.

## Where Is the Legal Standing?

The original lawsuit was brought by the Texas-led red States, and two individuals, against the United States, as represented by the Department of Justice (DOJ). But with the election of Donald Trump in 2016 on a platform that included opposing ACA, DOJ properly decided not to defend ACA on appeal. It informed the Fifth Circuit as follows:

The Department of Justice has determined that the district court's judgment should be affirmed. Because the United States is not urging that any portion of the district court's judgment be reversed, the government intends to file a brief on the appellees' schedule.<sup>1</sup>

So, there is no true "appellant" on this appeal. But Article III of the Constitution requires a "case" or "controversy" before a federal court, including an appellant court, can issue a decision. Where is the "controversy" if both sides agree with the district court decision? Even if the parties themselves do not raise this Article III issue, it is incumbent on the Court to assess its own federal subject matter jurisdiction, and dismiss the appeal whenever such jurisdiction is lacking.

When there are two sides to a lawsuit, and one side wins at the trial level and the losing side does not want to pursue an appeal, the case is over. Appellate courts do not issue advisory opinions, but require the existence of a continuing case and controversy to consider an appeal.

The blue States as led by California, and the House of Representatives as currently led by Speaker Nancy Pelosi, argued on appeal against legal standing by the individuals and States which filed the lawsuit. But what goes around, comes around. It is, in fact, the supporters of ACA who lack standing to bring the appeal. Neither may properly step into the shoes of the United States to pursue the appeal. Once the United States dropped its Fifth Circuit appeal, the appeal should have been dismissed, and Judge O'Connor's decision should have then gone into effect.

The *amicus curiae* brief submitted by this author on behalf of AAPS and the Citizens' Council for Health Freedom was the only one to alert the Fifth Circuit to the lack of standing by the supporters of ACA on appeal. All the other parties ignored or overlooked it. But after AAPS raised this issue, the Fifth Circuit then jumped on it by ordering the parties to address it with supplemental briefing on the eve of the oral argument.

The Executive Branch has the exclusive authority under the Constitution to enforce federal law. Perhaps the blue States could sue the United States to compel such enforcement, but they cannot pretend to be the United States in order to enforce federal law. Just as some States could not enforce federal laws against marijuana against other States that legalize it, some States cannot enforce ACA against other States that challenge it. States do not have standing in federal court to step into the shoes of the United States.

The alleged "injury" or "interest" to the California-led States was that they would lose more than half a trillion dollars of anticipated federal funds.<sup>2</sup> pp 37-38 Such injury was and is entirely speculative as it depends on future congressional

appropriations, which may or may not occur.

One group of States pitted philosophically against another group of States on appeal over the constitutionality of a federal law amounts to an Article III absurdity, not a legitimate "case" or "controversy." Once the United States conceded the Plaintiffs' position, that should have meant that the Plaintiffs win and that the federal appellate subject matter jurisdiction evaporates.

The original plaintiffs have standing, but the opponents of the decision who intervened to pursue the appeal do not. The Fifth Circuit, like all federal courts, has an obligation to raise the issue of standing *sua sponte* even if no party argues it.

U.S. Constitution Article III standing must "persist for the duration of the lawsuit,"<sup>3</sup> and it was lacking for the California-led States and the House of Representatives. The appeal by the ACA supporters should fail, making permanent the good decision by Judge O'Connor invalidating ACA.

## The Tenth Amendment

The Tenth Amendment provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. The Tenth Amendment is the elephant in the room against the constitutionality of ACA, and it should be the starting point for any court in analyzing ACA. Two years after the first phase of ACA litigation, when the Supreme Court upheld it in *NFIB*,<sup>4</sup> the Supreme Court breathed life into this essential protection of State authority against federal encroachment in the case of *Bond v. United States*.<sup>5</sup> p 844

In *Bond*, Chief Justice Roberts wrote for the High Court in reasserting State autonomy under the Tenth Amendment, a mere two years after he wrote the decision upholding ACA. He quoted James Madison favorably for the principle that the constitutional process in our "compound republic" keeps power "divided between two distinct governments."<sup>6</sup> Based on the Tenth Amendment, the Chief Justice rejected "a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States."<sup>5</sup> p 866

Nowhere is the Tenth Amendment more important than in protecting the patient-physician relationship against extensive federal encroachment. ACA deprives patients of their liberty to buy, and insurers of their liberty to offer coverage that does not conform to the dictates of ACA architects and enforcers. ACA usurps the authority of States to regulate insurance and infringes on individuals' rights to arrange methods of payment for care. ACA also prevents patients from building their own patient-centered networks to receive medical care. The federal insurance mandates, like the Individual Mandate found below to be unconstitutional, essentially force people to buy products they do not want. While the penalty under ACA is no longer a tax, ACA is still imposing mandates that infringe upon State and individual autonomy over medical care.

The Fifth Circuit (or Supreme Court) could affirm the ruling of the district court on Tenth Amendment grounds, because “reversal is inappropriate if the ruling of the district court can be affirmed on any grounds, regardless of whether those grounds were used by the district court.”<sup>7</sup> States have traditionally been the exclusive authority over health insurance, and ACA transgresses the Tenth Amendment by interfering with this domain of the States and the People, particularly after repeal of the federal tax associated with the Individual Mandate. An affirmance by the Fifth Circuit or by the Supreme Court should cite the Tenth Amendment as an additional basis or, better yet, as the primary basis.

### The Sky Will Not Fall with an Invalidiation of ACA

ACA supporters paint an apocalyptic future if ACA is invalidated. They ignore the enormous benefits of the free market, free enterprise, deregulation, and competition, which would ensue if ACA ended. AAPS explained to the Court that ACA has destroyed competition and the free market to the detriment of patients, and to the enrichment of the largest health insurers.

Appellant House of Representatives, for example, argued to the Fifth Circuit that “the consequences will be devastating,” “[m]illions of Americans will be denied affordable health care,” “[i]nsurance costs will skyrocket ... [a]nd the Nation’s healthcare system will be thrown into chaos.”<sup>8</sup>

Not to be outdone, the California-led States argued that an invalidation of ACA would “seriously undermine public health,” cause “32 million more people without healthcare coverage by 2026,” destroy “2.6 million jobs,” and even cause, in Pennsylvania alone, “3,425 premature deaths each year.”<sup>9, pp 37-38</sup> As if prophecy of these Armageddon scenarios were not enough, the blue States insisted that invalidation of ACA could even have the effect of “stressing financial markets.”<sup>9, p 38</sup> Missing from their doomsday scenario is any hard data or real evidence; it consisted of nothing more than an ideological preference for government planning over free-market solutions.

The prediction by the California-led States concerning the financial markets is particularly ironic. In fact, significant beneficiaries of ACA have been investors in health insurance stocks, such as the nation’s largest health insurer, UnitedHealth Group (stock symbol “UNH”). Easily accessible online market data show that the value of the stock UNH was only \$32.67 per share on Mar 31, 2010, around the time of the enactment of ACA. On Dec 31, 2018, the same month that district court Judge O’Connor rendered his decision, the stock UNH was trading at a whopping \$249.12. This was a nearly eight-fold increase in the stock value of the nation’s largest health insurer, far in excess of the less than 2.5-fold increase in the Dow Jones Industrial Average of which the stock UNH is a part.

But the invalidation of ACA at this point may have little effect on UNH and other health insurance stocks, because most of those companies abandoned the unprofitable ACA

health insurance exchanges long ago. UnitedHealth Group blamed the ACA health insurance exchanges for a not-quite-as-lucrative quarter in 2015:

UnitedHealth Group (UNH) surprised investors on Thursday with some bad news. Earnings would be reduced by \$425 million because the Obamacare health insurance exchange product was performing poorly. In fact, it was so poor that UNH is considering pulling out of the exchanges altogether.

UNH stock fell about 5% on the news.

The problem UNH is grappling with is what critics of Obamacare have warned about since the beginning. Because individuals cannot be excluded for pre-existing conditions, those with chronic illnesses were able to obtain insurance. Claim payments on those chronic illnesses are obviously exceeding premium payments.<sup>10</sup>

Yet ACA handcuffed patients by depriving them of the immense benefits of free-market competition, which is what drives down for consumers the costs of technology, travel, and nearly every other good and service of the economy. ACA conferred the equivalent of a monopoly on big health insurers by making it impossible for viable alternatives to compete with them. UnitedHealth Group, Aetna, and other massive insurers then skimmed the gravy off the system and exploited the lack of competition caused by ACA. Health insurance premiums have doubled nationwide under ACA, even tripling in several States,<sup>11</sup> and shot up an average of 25% in 2017 alone.<sup>12</sup>

ACA has deprived patients nationwide of a competitive market for affordable high-deductible health insurance due to the expensive ACA mandates and regulations, leaving patients with no alternative to the continually rising premiums demanded by the big health insurers. A healthy dose of the free market, which would result from striking down ACA, is just what the legal doctor should order. This may “stress” the bloated health insurance stock values a bit, but only because patients will then be able to purchase, from the free market, health insurance products they actually want and need.

Under the current ACA regime, its mandates and regulations have left so little free-market competition for patients that the Department of Justice felt compelled to take an extraordinary and successful action to block a planned merger between Aetna and Humana, two of the largest health insurers.<sup>13</sup> Meanwhile, as patients suffered enormously under the ACA-imposed government planning, executive compensation at the biggest health insurers grew hugely. For example, when ACA went into effect, Aetna’s CEO’s pay increased to \$36 million in one year.<sup>14</sup>

The only “devastating” effect that invalidating ACA would have is to unleash free-market forces for the benefit of patients, at the expense of some health insurance monopolies. Patients are already abandoning the ACA-mandated insurance in droves. “The number of U.S. people with unsubsidized individual major medical insurance fell to 6.2 million in 2018, **down 31 percent** from 9 million in 2016.”<sup>15</sup> ACA imposes so many mandates that health insurance has become

prohibitively expensive for average Americans, and affordable high-deductible insurance will become more available once the suffocating force of ACA is removed.

Deregulation of the airline industry in 1978 overcame substantial opposition. One argument was that it would not be safe; another that it would not benefit consumers. Yet 40 years later, the result of that deregulation for consumers has been a vast expansion in travel options, at much lower cost and greater safety. As Fred Smith and Braden Cox of the Competitive Enterprise Institute wrote:

The rigid fares of the regulatory era have given way to today's competitive price market. After deregulation, the airlines created highly complex pricing models that include the service quality/price sensitivity of various air travelers and offer differential fare/service quality packages designed for each....

As prices have decreased, air travel has exploded. The total number of passengers that fly annually has more than doubled since 1978. Travelers now have more convenient travel options with greater flight frequency and more nonstop flights. Fewer passengers must change airlines to make a connection, resulting in better travel coordination and higher customer satisfaction.<sup>16</sup>

The same immense benefits would result for patients, if the government would allow this as it did for the airline industry. Imagine if we had the same transparency and competitiveness in medical care that we have for airline travel. The enormous transaction costs that are obstructing free enterprise and innovation in medicine could then be removed for patients, and all except for intermediaries would be better off. Surgeries and other treatment could be purchased as people buy airline tickets over the internet today. Innovation in medicine would then soar, and costs would plummet.

Far from the doomsday scenario forecast by ACA defenders, medical services in the United States would improve if and when ACA is finally invalidated as unconstitutional. Unleashing the "invisible hand" of the free market and productivity is long overdue, for the sake of patients.

### **Courts Should Not Legislate from the Bench by Severing ACA to Save It**

Finally, there is the issue of severability with respect to the constitutionality of ACA. The Individual Mandate is not properly severable from ACA because the Individual Mandate is both "essential to" and "intertwined with" the entirety of ACA, as State appellees, individual appellees, and federal defendants all argued. They elaborated on the NFIB Joint Dissenters' explanation that "without [the Individual Mandate, guaranteed issue and community rating provisions], ACA's interlocking web of provisions cannot function as Congress intended."<sup>17, p 43</sup>

All of the factors point against salvaging ACA by severing its unconstitutional Individual Mandate from it. As explained

by the Joint Dissenters in *NFIB*:

An automatic or too cursory severance of statutory provisions risks "rewrit[ing] a statute and giv[ing] it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362, 55 S. Ct. 758, 79 L. Ed. 1468 (1935). The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact. That can be a more extreme exercise of the judicial power than striking the whole statute and allowing Congress to address the conditions that pertained when the statute was considered at the outset.<sup>18</sup>

As explained above, court-invented severability is inadvisable. Our republic requires political accountability for public officials. Court-imposed severability is contrary to that accountability, and would amount to legislating from the bench. Legislative decisions should be made in legislatures, not in courts. A brief led by Sen. Robert Byrd in the line-item veto case of *Raines v. Byrd* before the U.S. Supreme Court more than 20 years ago explained the importance of respecting legislative process as follows:

Clashes of interest are an inevitable part of representative democracy in a continental nation whose "so many separate descriptions of citizens" embrace, as Madison observed [...], a "great variety of interests, parties and sects." The Framers anticipated and respected clashes of interest, while providing for accommodation through "a process of discussion and compromise" ....

Applying a new "science of politics," The Federalist No. 9, p. 51 (Hamilton), the Framers not only accepted "human nature," *id.* No. 51, p. 349 (Madison), but enlisted it to help bring about an enduring republic. There would be conflicts. "Ambition must be made to counteract ambition," Madison wrote. Thus, ***the Constitution is organized around devices that offset "by opposite and rival interests, the defect of better motives."*** *Id.* Throughout our history Members have supported measures to achieve progress in other regions "for the common benefit." But the Framers also expected Members would often be "partisans of their respective States." The Federalist, No. 46, p. 318 (Madison). [(footnote omitted, emphasis added)].<sup>19, pp15-16</sup>

During the Constitutional Convention, at a point when the convention was in bitter disarray and at risk of dissolving, Benjamin Franklin addressed the process of legislation by comparing it to the construction of a table:

When a broad table is to be made, and the edges (of planks do not fit) the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating principle.<sup>19, p 16</sup> Patching and reworking broken statutes is a legislative

function, not a judicial one. Judicial severability to salvage a statute lacking in a severability clause is improper because it supplants Congress, and evades the accountability that Congress has. Senator Byrd, in opposing the line-item veto, compared it to the historic abdication by the Roman Senate of its authority, which some historians feel led to the collapse of the Roman Empire.<sup>20</sup> Congress may be all too willing to give up its power to an often left-leaning court system, but the courts should not permit Congress to “pass the buck.”

In addition, severance of a provision from a statute further interferes with the President’s role under the Constitution in the legislative process. The President would thereby be deprived of the opportunity to sign or veto a statute after a provision has been severed. Courts should not be rewriting statutes, or amending them by severing unconstitutional provisions when no such severance was intended. Congress, not the Courts, is the only entity that has proper authority to salvage ACA (which Congress should also decline to do).

Judge Kurt D. Englehardt on the Fifth Circuit panel made a similar point during oral argument in the ACA appeal: “Why would the Senate not also be here [in this litigation] to say, ‘Oh, this is what we meant when we wrote this?’ They’re sort of the 800-pound gorilla that’s not in the room.”

Another judge on the three-judge panel, Jennifer Elrod, likewise cast doubt on the constitutionality of ACA during oral argument by observing: “How do we know that some members [of Congress] didn’t say, ‘Aha! [The Individual Mandate] is the silver bullet that’s going to undo the ACA or ‘Obamacare,’ if you prefer?” Then Judge Elrod added in imagining what congressmen may have intended, “So we’re going to vote for this just because we know it’s going to bring it to a halt, because we understand the tax issue?” Her comments during oral argument were interpreted as part of her skepticism about the continued constitutionality of ACA without the Individual Mandate.

For years now a majority in Congress has not even supported ACA, yet no one in Congress seemed to want to pull the life support on it. The entitlements under ACA are apparently not easy politically to repeal, but they should be invalidated as unconstitutional by the courts.

## The Road Ahead

The three-judge panel of the Fifth Circuit will not have the last word. The losing side will either petition the full Fifth Circuit for a rehearing *en banc*, or appeal directly to the Supreme Court by filing a petition for certiorari, asking the High Court to review the lower court decision. While the Supreme Court “denies cert” on 99 percent of the petitions brought before it, the likelihood seems high that it would grant cert in this case due to its national significance.

## Conclusion

Conceived in 2009 by President Barack Obama as its mother and the Ted Kennedy-controlled Senate as its father,

ACA was born in 2010 after Sen Ted Kennedy passed away. ACA then lived a life of juvenile delinquency that ultimately even Democrat candidates for president have begun to criticize. It is time to pay our respects and move beyond this failed experiment in quasi-socialized medicine.

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