



## this issue

Surprise Obamacare ruling **P.1**

2.7 million words of regulations **P.1**

How will states respond **P.3**

Regulations open for comment **P.4**

## The U.S. Supreme Court issues a surprise ruling on Obamacare

There were many predictions leading up to the U.S. Supreme Court's June 28, 2012 decision on Obamacare. But the court's decision was a surprise to most of us who have been following the case.

### The Individual Mandate and Congress' taxing power

In an opinion by Chief Justice Roberts, (joined by justices Ginsburg, Breyer, Sotomayor, and Kagan) the Court held that the individual mandate provision in Obamacare, i.e., the requirement for most Americans to purchase health insurance or pay money to the IRS, is a tax that was properly applied by Congress.

The Court held that this payment for not having health insurance was not a "penalty" because it does not punish the individual for an unlawful act, but is instead a use of the tax code to encourage behavior, much like other aspects of the tax code such as tax deductions and credits for certain behaviors and circumstances.

The Court did hold that the imposition of the

### 2.7 million words of regulations remain—untouched by Supreme Court's ruling

The court's ruling seems an appropriate time to update our readers on the length of Obamacare regulations.

We now calculate that Obamacare's regulatory implementation documents are 2.7 million words long.

To give you an idea of how long that is, it is:

- Over twice the length of the Guinness World Record longest novel, the 13-volume *Remembrance of Things Past*.
- Over three times the length of the KJV Bible.
- Nearly 5 times the length of *War and Peace*.
- 6 times the length of the 2,700 page Obamacare statute.

(Continued on page 2)

(Continued on page 4)



## Surprise Obamacare ruling (continued)

*(Continued from page 1)*

individual mandate could not be sustained as part of Congress' Commerce Clause powers, but at the end of the day the result is the same: those who choose to not purchase health insurance must pay a "tax" to the federal government for exercising that right.

This begs the question of what is the limit to the Congress' taxing power. The Court gives us little on that point. The Court does

acknowledge that there are such limits, but the cases cited on that point are 90 years old. The indicia that a tax is actually a penalty and thus beyond the taxing power include the following:

- (1) whether the amount of the money to be paid is an "exceedingly heavy burden" in comparison to the cost of the alternative;
- (2) whether there is a scienter requirement before the payment is required, i.e., whether knowledge that an act or inaction will lead to the requirement to pay; and
- (3) whether the Department of the Treasury is responsible for enforcing the requirement to pay rather than one of the regulatory agencies like the Department of Health and Human Services or the Department of Labor.

The exact limit on when a tax becomes too burdensome as to actually be a penalty is not clear. In one case cited by the Court, the imposition of a 10% penalty [tax] on the net income of an employer for a violation of a labor standard that at the time was recognized

to be beyond the reach of Congress (whether child labor could be regulated) was considered too much.

Unless the tax contains the indicia of a penalty as described in the three points above there likely isn't a real limit to that power, at least in areas where the taxing power doesn't directly collide with another constitutional provision. When the taxing power does collide with another constitutional provision

then the issue becomes which provision wins the day.

### Medicaid expansion

Then, in a surprising move, the Court ruled 7-2 against Obamacare's method of forcing states to accept its expansion of Medicaid to 133% of the Federal poverty line.

No one expected the

Supreme Court to actually place a limit on Congressional spending powers—not even the states that made the argument to the court.

Said Texas Attorney General Greg Abbott,

We thought we didn't have a chance to win this case. We inserted it in part to ensure that we had standing. We thought multiple times about abandoning the claim all together because of the magnitude of the legal challenge. Policy-wise we knew we had to challenge the Medicaid expansion mandate. Legally, we thought it was a loser all along. So we were stunned to learn the U.S. Supreme Court agreed with us.<sup>1</sup>

The court took issue with the way Obamacare coerces states to accept the new funding levels by threatening to cut all current Medicaid funding for states that do not

“ **In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement' – it is a gun to the head.** ”

*(Continued on page 3)*

## What cases out there still out there challenging Obamacare?

(Continued from page 2)

comply.

Prior to this ruling, the constitutional limit on Congressional spending was only theoretical. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court said that Congressional spending would be unconstitutional if it effectively coerced states into agreeing to a federal program. In that case they ruled that Congress had not gone that far.

But this is the first case where the Supreme Court has drawn a line in the sand and told Congress that their actions constitute unconstitutional coercion of the states. Says Chief Justice Roberts,

In this case, the financial “inducement” Congress has chosen is much more than “relatively mild encouragement” —it is a gun to the head.<sup>2</sup>

### How will the states respond?

The Supreme Court has ruled that Obamacare unconstitutionally threatened to withhold current Medicaid spending to states that refuse to implement Obamacare’s expansion of Medicaid eligibility.

Now the question is whether states will accept Obamacare’s expanded Medicaid eligibility and the billions in federal funds that go with it.

An early article by *Politico* suggests that Republican governors are at least considering their options.<sup>1</sup> Governor Bob McDonnell said

Each state now needs to decide whether or not it makes sense to enact its Medicaid expansion, which of course

The conservative justices on the bench (Scalia, Kennedy, Thomas, and Alito) would have thrown out Obamacare in its entirety solely on this issue. But the Chief Justice, along with Ginsburg, Breyer, Sotomayor, and Kagan, merely severed the part of Obamacare that threatens withholding current funds to states that do not agree to expansion.

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<sup>1</sup> Attorney General Greg Abbott, Remarks at the Heritage Foundation Event, The Plaintiffs’ Perspective on the ObamaCare Ruling (June 29, 2012) available at <http://www.heritage.org/events/2012/06/obamacare-plaintiffs>.

<sup>2</sup> Majority opinion, page 51.

comes with a cost of a real hit to Medicare as well as the very likely flight of people from small business policies now into a government-run Medicaid program, which has some other problems. It also has long term unfunded mandate, even though the federal government is picking up a good chunk of that.<sup>2</sup>

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<sup>1</sup> Reid J. Epstein, POLITICO, Governors draw battle lines over health care (June 29, 2012) <http://www.politico.com/news/stories/0612/78024.html>.

<sup>2</sup> *Id.*

## How to Comment on a Regulation

1. Go to the Regulations page at: [ObamacareWatcher.org](http://ObamacareWatcher.org)
2. Choose a regulation.
3. Click on the "Comment Now" link to be directed to the Regulations.gov website.
4. Click "Submit a Comment" which is located towards the top of the page.
5. Fill out the comment form.

## Glossary of Agency Abbreviations

<b>CMS:</b>	Centers for Medicare and Medicaid Services
<b>DOL:</b>	Department of Labor
<b>EBSA:</b>	Employee Benefits Security Administration
<b>HHS:</b>	Department of Health and Human Services
<b>HRSA:</b>	Health Resources and Services Administration
<b>IRS:</b>	Internal Revenue Service
<b>OIRA:</b>	Office of Information and Regulatory Affairs
<b>TREAS:</b>	Department of the Treasury

## Regulations open for comment

**Data Collection To Support Standards Related to Essential Health Benefits; Recognition of Entities for the Accreditation of Qualified Health Plans**  
**RIN:** 0938-AR36     **Agency:** HHS-CMS  
**Status:** Proposed rule; Public comments accepted through July 5, 2012 at 5pm EDT.

**Regulations Pertaining to the Disclosure of Return Information to Carry Out Eligibility Requirements for Health Insurance Affordability Programs**  
**RIN:** 1545-BK87     **Agency:** TREAS-IRS  
**Status:** Notice of proposed rulemaking and notice of public hearing; Public comments accepted through July 30, 2012.

**Health Insurance Premium Tax Credit**  
**RIN:** 1545-BJ82     **Agency:** TREAS-IRS  
**Status:** Final rule; Public comments accepted through August 21, 2012.

**Disregarded Entities and the Indoor Tanning Services Excise Tax**  
**RIN:** 1545-BK38     **Agency:** TREAS-IRS  
**Status:** Final and temporary regulations. Public comments accepted through September 24, 2012.

**Additional Requirements for Charitable Hospitals**  
**RIN:** 1545-BK57     **Agency:** TREAS-IRS  
**Status:** Notice of proposed rulemaking. Public comments accepted through September 24, 2012.

For the latest status on these and other regulations, visit us at:

<http://ObamacareWatcher.org>

## 2.7 million words (cont.)

*(Continued from page 1)*

We estimate that it would take 226 hours to read all of the regulations. That means if your boss hired you to read the regulations 40 hours a week, it would take you 5 and a half weeks to finish reading them.

Now that the Supreme Court has declined to overturn Obamacare, we must continue to vigilantly monitor these regulations.

See the column to the left for regulations that are open for comment this month. And, for a more up-to-date list go to [ObamacareWatcher.org/regulations](http://ObamacareWatcher.org/regulations).

### OBAMACARE REG WATCHER

FOR MORE INFORMATION CONTACT:

WILLIAM WILSON, PRESIDENT

AMERICANS FOR LIMITED GOVERNMENT

RESEARCH FOUNDATION

9900 MAIN STREET

SUITE 303

FAIRFAX, VA 22031

703.383.0880

[ObamacareWatcher.org](http://ObamacareWatcher.org)

