THE BROOKINGS INSTITUTION

THE CONSTITUTIONALITY OF THE HEALTH CARE LAW'S INDIVIDUAL MANDATE: AN OXFORD STYLE DEBATE

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P R O C E E D I N G S

MR. GALSTON: Good morning. Let me call this debate to order. Begin by introducing myself. I'm Bill Galston, a senior fellow in governance studies here at Brookings. I want to welcome you all to the first event of 2011 in our ongoing series called Governing Ideas. I see some veterans in the audience but some newcomers as well.

The idea behind Governing Ideas is that we spend a lot of time in this town talking about policy and politics -- and very important, but behind the policy and the politics are large ideas and intense controversies over those ideas, and that is the environment that shapes and defines much of what goes on every day.

Of all the governing ideas in this country, the Constitution is perhaps the largest and the most significant. We have been arguing about its meaning virtually since the day of its adoption, and if you don't believe me take a look at the early 1790s and the ferocious debate between comrades-in-arms James Madison and Alexander Hamilton over the scope of executive power.

We're gathered today to discuss and debate one of the most significant recent controversies over the meaning of the Constitution, namely the way in which it is applies to the now famous individual mandate in the health reform law enacted last year. At stake, of course, is one of the basic architectural building blocks of that law, but

beyond that the stakes include the proper interpretation of some of the most important provisions of the Constitution.

Now, these provisions, if you just open up the Constitution and read it, sound straightforward enough. They're all to be found in Article I, Section 8, and I quote, "Congress shall have the power to lay and collect taxes," and farther on, "to regulate commerce among the several states," and toward the end, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." But, as we'll see, the application of these terse and even Delphic words to the current controversy is not a simple matter at all.

To help us understand this controversy, to get beneath the headlines, we have brought together what I will literally describe as the A-Team. The full bios are in your packets, along with some writings on this subject that they themselves have selected for distribution.

But very briefly, in the order in which they will speak, David Rivkin is a partner in the Washington Office of Baker Hostetler where he chairs the firm's appellate practice. He served in numerous positions in the Reagan and Bush 41 administrations, and as many of you know he was the lead outside counsel in the recent Florida case, which led to one of the two decisions so far overturning the individual mandate.

To my immediate right but your stage left Walter Dellinger, who is chair of the appellate practice at O'Melveny & Myers. He was the assistant attorney general and head of the Office of Legal Counsel from

1993 to 1996 and Acting Solicitor-General for the 1996-97 term of the Supreme Court where I believe he argued, what, nine cases? Is that correct?

Ilya Somin is an associate professor at the George Mason University School of Law and co-editor of the *Supreme Court Economic Review*. He is the author of amicus briefs in two of the recent cases challenging the constitutionality of the individual mandate.

And Simon Lazarus is public policy counsel to the National Senior Citizens Law Center and the author of several widely discussed articles and legal briefs defending the constitutionality of the individual mandate.

This is with apologies to the graduates of Cambridge University who may be attending, this is in the Oxford debate format. It will feature 10-minute opening statements alternating between the affirmative -- that is to say, people, the team affirming the unconstitutionality of the mandate -- and the negative -- that is, people who deny that the individual mandate is unconstitutional. There will then be five-minute rebuttals in the same order. These exchanges will be strictly timed with sanctions yet to be determined for noncompliance. (Laughter)

After the formal exchanges, if there are gaps, which I sincerely doubt, in what you've heard, I may choose to address a question or two to each team. We will then turn, in what should be the

remaining 45 minutes, to questions from the floor starting with representatives of the press if they have questions and then turning to the audience. When it comes time for the question period, there will be a roving microphone so that you will not have to have the gist of your questions repeated by anybody on the panel. I would request now that you ask questions, not make statements; the questions be terse, pointed, and addressed to someone or someones in particular. It would also be helpful if before you pose your question you were to identify yourself by name and, if you choose, by institutional affiliation as well.

And, finally, the ritual plea to turn off any device you may have that is likely to make a distracting noise during the proceedings.

And with that, on with the show beginning with David Rivkin.

MR. RIVKIN: Bill, thank you very much. It's a pleasure to be here.

The individual mandate violates the most fundamental -- oh, sorry. Forgive me.

Thank you, Bill. Pleasure to be here.

And the individual mandate violates the most fundamental constitutional principles. It violates centuries of established case law, and it is fundamentally different from any law that Congress has ever enacted to regulate commerce. Indeed, I would submit if this mandate is constitutional when the framers drafting both the original constitution of

the Bill of Rights and of Congress' legislative activities from the founding to today are at best incoherent, at worst are superfluous.

Now, the bottom line of it, folks, we're defending the mandate -- is that doing nothing is an economic activity, that Congress can reach for the commerce clause proper or is augmented by the necessary and proper clause, and I would argue that this claim has at least five major constitutional consequences, all of which violate the fundamental principles in case law.

First, the most obvious one, it eviscerates the dual sovereignty system, which is a key feature of our constitutional architecture, which, by the way, is not just done for pedantic or archaic purposes but was meant to protect individual liberty by diffusing power both vertically and horizontally in the context of a federal government. In that system if it were to be viable, for it to be meaningful, the federal government has to exercise, ladies and gentlemen, limited and enumerated powers while their states are exercising "residual sovereignty," in the words of James Madison, which is often described as police power.

Now, what does it mean to exercise police power? That is the same thing as regulating people because of who we are, not because of what they do. In fact, it is the key attribute of the police power. Another key attribute of police power is that, unlike regulation of individuals based upon the activities, it cannot be avoided. Nothing

captures this thing better than one is dealing with a federal statute of irregulating wheat or cannabis. All that one has to do to avoid (inaudible) when the regulatory ambit of that statute is not to touch, possess, handle, or do anything else that people tend to do with those commodities. By contrast, when the state of Massachusetts wants to ensure that you will be vaccinated and you're in the borders of Massachusetts you cannot avoid this mandate.

Now, to justify claiming -- the claim that the federal government can regulate an activity -- the federal government, in essence, argues that an activity, in this particular instance a failure to acquire a particular good in service happens to be medical insurance, but broadly speaking -- good in service is within the scope of the commerce clause because it has an economic footprint.

The most elegant version of this argument made by Judge Kessler, which is one of our three judges that reads this issue, better written opinion, frankly speaking, than (inaudible), too, but still fundamentally flawed, his argument essentially proceeds as follows: A failure to purchase insurance, a decision; and since both purchasing and non-purchasing decisions in the aggregate has substantial economic footprint, can be used under the commerce clause. I would submit the front end makes rather heroic assumptions about how people reach certain situations in life a lot of times that doesn't involve structured decision. But more fundamentally, there's no meaningful limiting

principle here, because every situation, every failure to purchase, every failure to engage in, let's say, productive activity -- sleeping or taking a vacation -- in the aggregate, in the modern economy has substantial economic impact. No meaningful limiting principle can be found and, therefore, under that logic all inactivities can be swept under the commerce clause. The federal government is exercising general police powers, given the supremacy clause, the dual sovereignty system is vitiated.

Now, of course, the federal government is a bit nervous about making this argument bereft of any meaningful limiting principle, and they're trying to come up with a backup argument which basically says health care is unique. Ladies and gentlemen, it ain't true. It's not unique by a long shot -- all the efforts that have been made to explain how unique it is dealing with such things as inevitability of consumption. Well, there's inevitability of consumption across a significantly large strata of population in every market, including market for luxuries. If there was no such inevitability of consumption, those markets would not exist.

Then they talk about cost shifting. Cost shifting is ubiquitous in modern economy. In every market where you do not pay on the barrel -- cash on the barrel -- there is credit being extended; there's a possibility of default. Defaults occur on the scale that arrivals that, exceeds that in the health care market and the mortgage market,

and the credit card market, the market of personal bankruptcies, et cetera. So, there's really no limiting principle. The health care is not unique.

There are a lot of interesting arguments to be made about the necessary and proper clause here, which hopefully we'll talk about later, but let me just say for purposes of this discussion, the fundamental reason that the necessary and proper clause does not work for the federal government is this. The dual sovereignty system and the need for meaningful limiting factors are not unique to the commerce clause. The federal government cannot exercise general police power either by utilizing the commerce clause alone or the commerce clause as augmented by the necessary and proper clause or, for that matter, all of the enumerated powers in Article I. And if it were to do so, it would be improper. There are a lot of other reasons why the necessary and proper clause argument does not work, but that is probably the most palpable.

The other problem we have is the federal government's reading of a commerce clause and in answering proper clause. In effect, it eviscerates whole sections of a constitution, which we know both as a matter of logic and Supreme Court teaching going back to *Marbury v. Madison* is not the way to interpret the Constitution. If you think about it for a second, if you interpret the commerce laws and (inaudible), there are only two clauses in Article I -- the way federal government does -- all

of the other powers are completely redundant, are completely superfluous because the federal government can accomplish anything it wants using those two clauses alone. And unless you make an assumption that framers were not intelligent enough to figure it out, this is a fundamental problem.

Next fundamental problem is it, in effect, takes the Bill of Rights -- and always remember how it came about. The framers felt just about all the structural protections in the original Constitution, it made sense to come up with a secondary line of defense to deal with the possibility that the government exercising those powers it could exercise would nevertheless be abusive. Guess what. There's absolutely nothing in the Bill of Rights that deal with the problems posed by the capacious exercise of a commerce clause of and by itself which is augmented by a necessary and proper clause. It's completely irrelevant. And that, again, requires you to assume that the framers did not know that they were drafting the Bill of Rights.

The next problem is if the individual mandate works, that puts into question the sanity of all previous congresses, because Congress is always regulated under the commerce clause, indirectly and often partially, using the necessary and proper clause.

A perfect example: government simply mandating that people go out and buy flood insurance, Congress required flood insurance only in the case of individuals who are securing mortgage from

a family chartered bank. And the same if you look at all the other commerce clause statutes, including the one in (inaudible) and Wickert. Would have been a much more direct way of doing it, just mandate that people buy this or buy that. So, obviously Congresses up to now never could figure it out.

And the final problem is they would fundamentally rework -- it's more of a politically philosophy argument, but it does have constitutional implications -- would fundamentally rework the relationship between the citizens and the government. The government can actually compel individuals -- require individuals -- in a very few narrow areas that have to do with the core duties of citizenship -- voting, Census, serving in the militia or the military -- and all of them relate to, again, the core definition of civic responsibility and participation in government-run activities. Requiring individuals, in effect, to purchase goods and services from other set of private set of private individuals would fundamentally change that definition of citizenship which underlies our Constitution.

Thank you.

MR. DELLINGER: This case was decided in 1824 when Chief Justice Marshall wrote that the commerce clause confers upon Congress the ability to regulate that commerce which concerns more states than one. The notion that a regulation requiring the purchase of insurance that is central to a comprehensive, legislative reform of one-

sixth of the national economy is somehow beyond the power of the national Congress is an astonishing proposition. So, I'll open by saying, first, this is a regulation of the interstate market and insurance. Secondly, it's necessary and proper to Congress' regulation of the national health care market. Thirdly, it is not so intrusive that one would carve out an exception to what otherwise would be ordinarily assumed congressional authority over the regulation of commerce. It is no more intrusive than, say, Social Security or Medicare. And finally that the limiting principles seem clear to me and do not mean that if you can regulate this you can regulate anything. The Court will uphold this without saying anything remotely approaching such a sweeping conferral of authority on the national government.

President Reagan's Solicitor General Charles Fried testified on this, and to Charles it's quite simple. The Court confirmed in 1944 that Congress has the authority to regulate the insurance market, *Southeastern Underwriters v. the United States*. The Court has not for a moment ever backed away from that. Of course it's a regulation of commerce, and one way to regulate commerce is to create financial incentives for people to purchase health insurance, which this law does. It imposes up to a 2-1/2 percent surcharge or penalty on federal income tax for those that don't maintain minimum coverage. That's all it does. That alone should be enough. I actually happen to think it's not necessary to say that requiring the purchase of insurance is a regulation

of commerce, because it's so clearly necessary and related to what is obviously an indisputable regulation of commerce, and that is the regulation of insurance contracts and the insurance contracting business. To say that you may not deny coverage to people because of preexisting conditions, because of their own health, because a child is born with a birth defect, Congress can undoubtedly do that and it can, as to make that work, create a financial incentive for people to maintain insurance coverage before they're sick. Now, is there anything so intrusive about that, that it should be an example?

It is characterized as a regulation of inactivity. What it is actually is, is a use of congressional power to impose an affirmative obligation. And I will say in a few minutes why we might need a stronger justification for Congress to impose affirmative obligation. But that's what it is. When the Congress, in 1792, required every free male adult to purchase a weapon, ammunition, and a knapsack as an exercise of the militia power, no one said, oh, this is a regulation of inactivity. If we could regulate inactivity, we could regulate anything. It's just the imposition of an affirmative obligation, which again might require a stronger level of justification, which I will come to.

So, is there anything particularly intrusive about this particular regulation? It is in fact less intrusive, a less dramatic curtailment of "liberty" than Social Security and Medicare. It doesn't apply to any one -- the penalty provision doesn't apply to anyone who is

sitting out in the woods and just wishes to be left alone. You have to go into the economy and earn what is $18,000 for a couple in order to have to file a federal income tax for the penalty to be applicable to you at all.

So, if you go into the economy and you earn money, three things happen that are relevant here. One, you have to pay 7-
1/2 percent of your income, 15 percent if you're self-employed, in order to provide for your old-age assistance after you're 65. You have to pay a lesser percentage in order to provide for your health care after 65. And you have to pay 2-1/2 percent, a lot less, of the Social Security tax to provide for health care or to provide an incentive to provide for your health care before you're 65. The difference is that under the Affordable Care Act instead of having a monolithic governmental provider, what you have is a resort to the market, which is why this was always the conservative alternative for providing health care. It makes use of the national market. So, there's nothing so remarkable or intrusive about having a financial incentive to take care of this when Congress could have directly used the monolithic, bureaucratic solution. It just gives one more choice in a free market.

It tests no limits and approaches no slippery slope. The idea that if Congress can regulate this, it can regulate anything would be true only if the Court were to say that was why they were upholding it. They'll say no such thing.

It's quite simple to say -- first of all, the notion that you

could require people to eat broccoli or exercise gets you into the non-economic area of personal activity where there are long lines of relevant precedence under the due process liberty clauses that limit what state governments and Congress can do as it encourages (inaudible) liberty. I have no doubt that they would strike down a requirement that you eat broccoli.

Can this -- so suppose, could Congress require you to purchase other products? First of all, I want you to note the form of that slippery-slope argument. The exact same argument not only could but was made against Social Security and the minimum wage. Counsel was asking the Court to strike down the Social Security law in 1937 and began by saying if Congress can set up a social security system and require everyone under 65 to pay for the support of those 65 and older, it could set the retirement age at 25. And the Court said, yeah, but they won't. I mean, that's not a reason. Or you could say, with equal plausibility, if Congress can set a minimum wage under the commerce power of $5 an hour, it could set a minimum wage of $5,000 an hour. Those are always arguments whenever you assume that someone has jurisdiction to legislate. And if this is jurisdiction over legislation of the economic transactions in the insurance and in the health markets, then of course jurisdiction to legislate means $5, $5,000, unless there's some limit, which I'll come to.

Now, because this is an affirmative obligation, you might

say that Congress needs a more substantial justification. There's a limiting principle. I have no trouble with a limiting principle. You can pick up the Yellow Pages of the telephone book and come up with 3,000 goods and services which Congress could not order you to purchase just because they have an incentive that you enter into the health insurance market. And that's because what is unique about this market is that an enormous amount of the cost is transferred to other people.

First of all, 94 percent of the long-term uninsured have used the health care system. So, we are talking about a group that is active in the health care system. It's how you're going to pay for it. I think more telling is the fact that only one-third of the medical costs of the uninsured are borne by the uninsured. The other two-thirds are transferred to others. Of hospitalization costs, 90 percent of the hospitalization costs of the uninsured are transferred to other people who are sick or the taxpayers. You show me anything else in the Yellow Pages that meets that kind of dramatic description -- of $43 billion in costs that are shifted to others -- and I'll say, yeah, they could have an incentive to purchase that, too. But I can't find one between "accounting services" and "xylophones" that meets that description.

What's different is we have even the Emergency Medical Treatment Act. We have nothing like that. Can Congress require me to purchase a flat-screen television? No, and here's why. If my team surprisingly makes the Final Four and I haven't counted on this and have

no provision for a flat-screen television, I don't get to run to Best Buy and say my team made the Final Four and I don't have the money for a flat-screen television. Under the Emergency Flat-Screen Television Act, you've got to give me a flat-screen television and impose the cost on other customers. So, this is fundamentally different than any other market. Congress has adopted for this a market approach instead of a bureaucratic, single-payer approach -- which some of us might have favored -- and has done so to encourage, resort to a market. And that's why it was always proposed by Senator Dole, by Governor Romney, and others as the market-based alternative.

Seventy-five years ago, Benjamin Cardozo wrote for the Supreme Court -- and I'll just end with this quote -- he said, "Whether wisdom or unwisdom resides in the scheme of the statute in question is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here as often is with power, not with wisdom." That's from *Helvering v. Davis*, 1937, rejecting the constitutional challenge to the Social Security Act of 1935.

Thank you.

MR. GALSTON: Ilya.

MR. SOMIN: Thank you. So, I'd like to start out by thanking the Brookings Institution for organizing this event and Bill Galston for moderating. And in my time that I have I'd like to delve a little bit more deeply into the three provisions of the Constitution under which

our opponents and the federal government argue that the individual mandate is constitutional, namely the commerce clause, the tax clause, and finally the necessary and proper clause.

In talking about the commerce clause, I'm going to do something that law professors these days rarely do, and that is actually refer to text of the Constitution. Specifically, the commerce clause says that Congress has the power to regulate commerce among the several states, so right away, just looking at the text, it seems that there are two requirements that a regulation must meet if it is to be constitutional under the commerce clause. One is it has to regulate commerce; and, secondly, that commerce must be interstate.

Now, the individual mandate flunks both of these requirements. Not having health insurance is not commerce, and it's also not interstate.

That is sort of a commonsense tactual interpretation of the Constitution. It is borne, I think, by the structure and original meaning and the rest of the text of the Constitution. If you instead interpret the Commerce clause as giving Congress the power to do anything that might have some significant economic effect, then most of the other powers of Congress would, as David Rivkin said, be rendered completely redundant. For example, in the very same phrase where Congress is given the power to regulate interstate commerce, it's also given the power to regulate foreign commerce and commerce with the Indian

tribes. Now, those other two kinds of commerce clearly have an effect on interstate commerce, so if the interstate commerce gave Congress the power to regulate or do anything that has some kind of effect on interstate commerce, you wouldn't need these other two powers, nor would you need most of the other 17 powers assigned to Congress in Article I of the Constitution. So the framers could have saved themselves the trouble of writing most of what was in the Constitution. It was a long, hot summer in Philadelphia in 1787. They could, instead, have gone to the beach and cooled themselves and saved themselves the trouble of writing most of what they said there.

I would note also that this is more or less the way to the Supreme Court, interpret the Constitution throughout the first 150 years or so of our history. Walter Dellinger mentioned the 1824 case of *Givens v. Ogden*. In that case, Chief Justice Marshall actually mentioned a whole bunch of things that he said were not within the scope of Congress' commerce power. Among those things he mentioned were inspection laws, quarantine laws, and, perhaps most relevant for us, health laws of every description, in which category I think the individual mandate perhaps falls. So, during first the 150 years of our history, this sort of textual interpretation of commerce clause by and large was followed.

Now, I fully recognize that in the 60 or 70 years since then, since the 1930s, the Supreme Court has expanded the scope of the

commerce power, but it has still not expanded it anywhere near far enough to cover this case. Probably the broadest ever commerce clause decision was *Gonzales v. Raich* -- by the way, I think a terrible decision where the Supreme Court five years ago or six years ago said that Congress has the power to forbid the possession and growth of medical marijuana even if it was never sold anywhere. But even in that case, the Court said that they upheld this because this was economic activity and they define economic activity as “the production, consumption, or distribution of a commodity.” While not having health insurance it's not producing a commodity, it’s certainly not distributing a commodity, and obviously it’s not consuming a commodity. Rather, it’s choosing not to consume it.

Now, I think the government has offered a wide range of arguments nonetheless to try to say that the commerce clause covers this case, but all of those arguments have the devastating consequence that if you accept them, virtually any mandate of any conceivable kind could be justified. So, the government does try to say that health care is special for various reasons, but those reasons collapse under inspection. So, one reason they say that is that, well, everybody will consume health care at some point in their lives and that makes it different from other markets. But notice the bait and switch here. Nobody can argue that everyone will consume health insurance at some point in their lives. So, the focus is switched to health care. Well, you can do a similar bait and

switch to justify any other mandate of any kind.

Consider, for instance, the famous broccoli mandate. Not everyone likes broccoli as much as I do, so not everybody will eat it at some point in their lives, but certainly everybody participates in the market for food. So, you can therefore justify the broccoli mandate. Similarly, the car purchasing mandate. Not everybody will buy a car, but everybody does use the market for transportation.

Now, another way in which it is claimed that health care is special is that the government requires in some cases mandatory provision of health care services to the uninsured, and this, it is claimed, makes it special. But the government has never offered any reason why this difference has constitutional significance. Presumably it's because this has an economic effect on producers. But, of course, any decision not to purchase anything also has an economic effect on producers. If fewer people purchase cars or purchase broccoli, that has an impact on car manufacturers and on broccoli -- I guess they're not broccoli manufacturers -- broccoli farmers or whatever it is you call people who make broccoli. Perhaps we'll figure that out at some point during the course of this debate. (Laughter) But I know that to the extent that there are people who don't like broccoli as much as I do and, therefore, don't purchase and eat it, that certainly is bad for broccoli producers and has an economic effect on them.

All right. So as David Rivkin noted, in an intra-dependent

economy, not just today but even at the time of the founding, all sorts of decision to purchase or not to purchase necessarily have significant economic effects on people, so there's no way this can be a limiting principle. Nobody said, well, this claim of a slippery-slope effect is just paranoid. Congress would never do these things. In answer, I would say that the people nearby here on Capitol Hill, they have a long history of passing special interest legislation of various kinds, and there's numerous industry and corporate interest groups who would love to be able to lobby for bills allowing Congress to mandate the purchase of their goods. So, I think this is not at all a purely hypothetical danger.

All right, now I'd like to next briefly talk about the tax clause. The government argues that this is under the tax clause because it's a tax, they say, because there's a monetary payment if you are not -- if you don't fulfill the requirements of the individual mandate.

I would note that all four courts have addressed this argument so far, have rejected it on making the sensible grounds that this is in fact a penalty. It's not a tax. If it were a tax, then once again Congress would have unlimited power to mandate anything it wanted to mandate so long as the penalty for refusing the mandate was a monetary fine.

I would note also that I'm not the first law professor to suggest that this is a penalty rather than a tax. I would refer also to Professor Barack Obama, who said something very similar back in 2009

where he noted that for us to say that you've got to take responsibility to get health insurance is absolutely not a tax increase. In my view, President "Former Constitutional Law Professor" Obama was absolutely right on that point, and I hope that in time his lawyers in this litigation will come around to his position on this issue and drop the tax argument.

Lastly, the government relies on the necessary-and-proper clause. And as has been pointed out before, however, the necessary-and-proper clause is not a freestanding power; rather, it's merely a power to bring into execution other powers that Congress has given elsewhere in the Constitution. And in order for something to qualify as permissible under a necessary-and-proper clause, it must be both necessary and proper. One out of two is not enough the Supreme Court has said on several occasions. Now, the Supreme Court has defined the word "necessary" very broadly as just useful or convenient, but it has not given a clear definition of the word "proper." And I would argue that if the word "proper" means anything, it certainly means not giving Congress unlimited power to mandate anything and also not making most of the rest of the Constitution completely redundant. That would certainly seem to be improper. And under the government's argument here, just about any mandate of any kind could be upheld under a necessary-and-proper clause, be as pretty much -- any mandate can be useful or convenient in some way to carrying out one of Congress' other enumerated powers, such as the commerce clause. So, under the necessary-and-proper

clause as well, we cannot allow arguments that would uphold a statute on the grounds that Congress has virtually unlimited power to mandate anything it wants.

So, the final analysis is this, that the power to mandate just about anything of any kind is not a power that is allocated to Congress under the Constitution, and it's an extremely dangerous power to give Congress for reasons that are readily apparent to those of you who spend a lot of time in this town and are familiar with the activities of various interest groups.

Thank you very much.

MR. GALSTON: Sy?

MR. LAZARUS: Thanks to all of us and you who are participating. Those were very -- everyone has presented their views predictably effectively.

The proposition that we are considering here, as I understand it, is a proposition that the individual mandate is unconstitutional, and I think that in order to address that we have to consider whether we're talking about unconstitutional under the law as it was clearly specified and understood before these lawsuits were brought or whether we're talking about the law as those who were bringing the lawsuits would like to change it.

There really is -- and changing the law, by the way, is an honorable and appropriate American tradition. If you couldn't change

constitutional law, *Plessy v. Ferguson* would be the law of the land. So, there's nothing inappropriate about the opponents of health reform attempting to change constitutional law. But I think we should be very clear that the law, as it has been declared by the Supreme Court and well understood for at least 75 years since the New Deal period and actually stretching back to the foundational decisions of Chief Justice Marshall that Walter and others referred to, the individual mandate is really -- the question of constitutionality is not really a close case. And that is why when these lawsuits were first brought, conservative legal experts like Charles Fried, like Orin Kerr at George Washington who said that they had a 1 in 100 chance of success, like Eugene Volokh at UCLA -- all of these people scoffed at the case against the individual mandate. And to appreciate why that is so, I'd like to try and demystify the issue if I possibly can.

Just consider what the proposition that those attacking the constitutionality of the mandate are asserting. They are saying that the Constitution empowers five unelected Supreme Court justices to rule that Congress cannot -- cannot do what it, with enormous basis in the experience of state governments and in the work of experts -- cannot do what is necessary to guarantee that people who have preexisting conditions who have had cancer or diabetes or much lesser things -- to guarantee that those people can obtain health care. And in order to obtain health care, it's necessary to have health insurance as we all

know. They are saying that the Constitution forbids Congress -- forbids Congress -- to do that if it is going to try to do that by building on the existing mix of private and public sources of insurance that we now have. They are saying that the only way Congress could do that is to legislate -- is to extend Medicare to all adults, for example, or otherwise to expand or create a single-payer, government-run system.

The case to the contrary -- that is to say, the case in support of the mandate -- really boils down to the point that the Constitution does not put that kind of a straightjacket on Congress.

So, changing the law so that it does put that kind of a straightjacket on Congress is really what these lawsuits are about, and we should consider not only what the changes are in the law but what their consequences would be and whether those consequences are good, what other laws would be threatened. So, I'd like to try to clarify that a little bit.

It seems to me that the law as it now exists that pertains to all of this comes down to three fundamental propositions, every one of which is either contravened or outright repudiated by the case that my friends over here -- Ilya and David -- are making against the mandate.

The first proposition is that the commerce clause gives Congress the power that's necessary to manage -- effectively and responsively manage the national economy. And that assertion, that proposition was articulated, in effect, by Chief Justice Marshall and it's

been reaffirmed by the monitoring court over and over again, and I'm sure emphasized not simply by the justices that we might consider liberal or progressive.

The most articulate statement of that point of view really was Justice Kennedy in his concurring opinion in the *Lopez* case in 1995 where he stated that Congress can have confidence that it can regulate with recognition that there is a single national market, and it can have confidence that it can do what's necessary to ensure a stable national economy. That proposition is directly repudiated, or contravened in any event, by the case against the mandate. I note that Ilya, for example, who is a very prominent and I think very responsible and articulate and thoughtful exponent of the Libertarian agenda behind these cases, has said that health insurance is not an interstate commerce because it is primarily regulated by the states. You know, this is simply a proposition that is totally at odds with the view of the Constitution that is embodied in both modern and in Chief Justice Marshall's interpretation of the Constitution.

The second proposition is even more important, and there's been a lot of discussion about that, and that involves what lawyers call the necessary and proper clause, and this proposition is simply that once Congress undertakes to regulate the national economy under commerce clause, it can pick whatever method of doing that is most effective. In Chief Justice Marshall's terms, it's plainly adapted to that end. The

technique it uses does not itself have to be justified with reference to the commerce power or some other enumerated power. That is absolutely the most fundamental part of the law of relevance to this case, because that is what it is that makes it clear that the mandate has a method of allowing Congress to guarantee coverage for people with preexisting conditions. It makes it clear that that is constitutional.

And I should point out that the single, strongest opinion supporting this case for the mandate was written by one Antonin Scalia in the case that Ilya just labeled a terrible decision in *Gonzales v. Raich*.

Finally, the third point that is the third leg of modern constitutional jurisprudence here is that there are limits on the commerce power. The notion that if this mandate is upheld there won't be any limits on the commerce power under existing law -- under all these terrible decisions that the Supreme Court has rendered in the last 75 years. There are no limits. That is absolutely not true. There are limits. Limits prescribed by other provisions of the Constitution limit the exercise of the commerce power, or other powers, and most importantly Congress cannot, under the commerce power, impair individual rights. And what we're talking about right here is an asserted individual liberty interest, or individual right -- the right not to have insurance.

But the jurisprudence since the New Deal has been that unless an asserted liberty interest is "fundamental," the courts cannot overturn the legislation as being challenged as long as there is a rational

basis for that legislation, as long it's rationally related to the objective that Congress is trying to achieve, which makes it very difficult to overturn it. However, there are numerous rights that have been determined to be fundamental, and in those cases to gets to be quite easy for the Court to overturn it. The fact is when you actually look beneath the hype about the individual mandate, you would see, as Walter pointed out very eloquently, that this is not a fundamental liberty interest at all; it's, at best, a trivial personal liberty interest because of the fact that the people who go without insurance are really shoving their costs off on other people. As Governor Romney said when he signed the Massachusetts law that includes an individual mandate and is the only effective law that we have that outlaws turning people down because they have preexisting conditions, he said, "Free-riding on the government is not libertarian." And I think that that really, to me, in common sense terms states the case as to why this law is perfectly constitutional.

MR. GALSTON: Thanks so much. We've now reached the rebuttal stage, starting with David Rivkin.

MR. RIVKIN: Thank you, Bill.

Look, it's not a tax. Every court that looks at. It's not a tax. It doesn't mean it couldn't have been a tax. That's not what Congress did. And the reason they didn't do that is a very simple reason. They didn't want to pay the political price for it, okay? It would have been very easy to write it up as a tax. They could have said you pay extra tax and

then if you purchase this particular type of qualifying insurance package, you get a deduction. But they didn't want to pay the political price. So, that's easy.

The militia stuff. I said very clearly I'm not making a broad libertarian argument, ladies and gentlemen. The government cannot compel individuals to do anything. It can pursuant to narrow, specific, enumerated powers that go to the core of one's citizenship once membership in embodied polity. One of the reasons it can be done without jeopardizing the dual sovereignty system because these powers are narrow, and even augmented by necessary and proper clause did not amount or specie of general police power. That ain't the case with the commerce clause.

But the notion that there is something unique about health care is utterly specious and it's frustrating to me, because people keep throwing $43 billion around. I argued in the first round of our argument that there's over $80 billion worth of cost shifting in the credit card market, because people don't pay their credit card bills. Guess what happens with it, ladies and gentlemen. The free-riders who are getting discharged for bankruptcy and other means saddle you with that, those who pay their credit card bills. An economy almost tanked because of a subprime mortgage with hundreds of billions of dollars worth of cost shifting. Anybody is capable in modern society of imposing costs on his fellow citizens -- when you lose a job, be it an accident, if you're not an

insured. Unless you carry with you a bubble, an insurance bubble, that mitigates all the costs you're going to impose on your fellow citizens, you are going to be capable of imposing such costs. So, under the government's logic, all of us are supposed to buy comprehensive insurance.

Remember the AFLAC commercial? There's nothing to do -- you could be broke. Even if your medical expenses are paid for, what about your food, what about your gas? You don't want to be asked to pay that. There ain't anything unique about medical insurance market, and that's the truth.

Now, the thing that stuns me, frankly, that anybody who cares about civil liberty is going two claims, both of which if we -- by the way, my favorite argument made during the Bush administration -- most of you would be appalled.

Claim No. 1. You know what? If it's stupid, Congress is not going to do it. It may not be just dishable. There may not be a way to do that in the context of a case. Five men or men and women sitting wearing robes in the Supreme Court. But who cares? Congress is not going to do it. Can you imagine an argument used in the context of one less wiretapping when in interrogations at Guantanamo? Half of you -- probably two-thirds of you would be appalled by that. That's what we hear. Don't worry about it. It's not going to happen, because Congress is not going to do it.

The second argument that is utterly specious -- and I'm sorry to put it in such blunt terms, Walter, (inaudible) -- what individual liberty doesn't violate the Bill of Rights? The Bill of Rights, ladies and gentleman, is the secondary line of defense in our constitutional system. The first line of defense is structural limitations on ability of governmental units to deal with us, okay? Congress holds legislative power, not executive, not judicial. Article III, Courts hold judicial power. Nobody's asking whether or not an Article III court can rule legislative power provided it doesn't violate some interest protected by the Bill of Rights. That is an absurd level of inquiry.

The bottom line is this: Congress could have done -- oh, and my third favorite is but Congress could do it in other ways. The Constitution, ladies and gentlemen, is fundamentally about how you do things. Congress could have done it and been willing to pay a political price. The fact that they chose to do it in this way is what dooms this particular mandate.

And the final point, which I think my colleague Ilya made twice, it's not called necessary or really necessary clause -- it's called necessary-and-proper clause. And I notice my friend, Richard, did not quote the full cite from *McCullough*. The language was, "It has to be proper," not "repugnant," "to the Constitutional scheme." Nothing could be more repugnant than using the necessary-and-proper clause in conjunction with the commerce clause. That eviscerates dual

sovereignty. Nothing can be more repugnant. So, if we have time I can explain to you why it's really necessary, which is a much more elaborate and technical argument. But it certainly ain't proper.

And the last thing that makes me hot under the collar, there's no case law that supports the proposition. None. If we have time to go and talk about every single commerce clause case -- which I'd be happy top -- and every single necessary-and-proper case, it does not support that position. The notion that we're trying to overturn, establish constitutional principles and go back to the pre-Lachlan or, you know, Lachlan era jurisprudence is just specious. It ain't so. This is utterly unconstitutional, probably the most unconstitutional provision in our history, and I'm saying it without hyperbole.

Thank you.

MR. DELLINGER: The argument against this bill comes down to three points. Putting aside the argument that is "novel and unprecedented," usually in italics, which just means we haven't done this before, which is an argument against every piece of legislation Congress has enacted for the first time. Putting that aside, the arguments come down to three. One, it's not a regulation of commerce. Two, if it were to be treated as if it were, it would render the other provisions granting the power to Congress redundant. And if were approved by the Supreme Court it would give Congress a limitless authority, the slippery-slope argument.

The argument is not commerce is understandably half-hearted. Ilya would recognize that it would require the flat overruling of Southeast Underwriters, which held that the business of insurance is a national market that can be regulated and all of its manifestations that I think that's beyond the (inaudible). So, the rest of the argument really carefully avoids looking at what is a mandate itself by arguing that the redundancy argument and the slippery-slope argument -- change the focus of what actually is going on here.

So, let's think about it. It's simply a requirement that you maintain minimum coverage for paying an additional 2-1/2 percent penalty when you file your federal income tax if you're in the economy and earn taxable income with lots of exemptions for people with religious objections. Of course, everybody that has their own employer-based health care, people that are over 65, people whose income is too low that it would be a hardship -- all of those are exempted. Everybody else has to pay 2-1/2 percent. No one who showed up for work and was told you have to pay 7-1/2 percent for old-age retirement, and you have to pay another percentage for your medical care when you're after 65, and you have to pay 2-1/2 percent unless you maintain minimum insurance coverage is going to say oh, my God, this third one is the end of liberty in America. Why, it's going to seem perfectly unremarkable. So, relevant focus on the unremarkability of having an incentive to participate in this national market.

They talk about the redundancy argument. Would it mean that the other 17 heads of congressional authority are redundant? To the extent that that's true, it's true not because of an expansion of converse clause doctrine. It's because of an expansion of the national economy. The framers contemplated the national Congress could regulate that commerce which concerns more states than one, and they created the greatest national common market the world has ever known. What they perhaps did not foresee is not any doctrinal development. It's not the Supreme Court. It's American enterprise that has this as an enormously interdependent economy because of modern transportation and communication.

In 1787, if I got sick in North Carolina, it had no effect on anyone in Pennsylvania. That's no longer true in our economy. So, yes, there are things that -- there are other heads of powers that are not necessary now that we have an interdependent national economy when Congress regulates something like the national market and health care.

Slippery-slope arguments are always available. The idea that this would be done states of course they would acknowledge, have the power to impose mandates on people; that is, they have the jurisdictional authority unless it runs into the Bill of Rights. Fifty states haven't been going around requiring everybody to buy products when for 200 years they've had the authority to do this. Why would the notion that Congress had some commerce clause power over one kind to do that?

Slippery-slope arguments really are not supposed to be arguments from logic but from actually predictability -- if we do this, terrible things will happen. That's why the Supreme Court was reluctant in *Lopez* and *Morrison* to give Congress the authority to regulate guns in their schools and violence against women, because of those effects on commerce, because Congress would like to double down and regulate local crime on the basis -- because it's a good thing to vote against on the basis of its connection. But that's non-economic, local matters. It's not economic national matters.

I think, but I testified before the House Judiciary Committee, at least 17 members of the Committee said if the Supreme Court upholds the individual mandate, there will be no limits and Congress can do anything. Well, my prediction is that this will not be that close. There will be at least 6 to 3. Chief Justice Roberts -- and I'm willing to hold up a sign saying Ilya Somin and David Rivkin are smarter than I am -- for an hour out front of this building -- if I'm wrong about this. (Laughter) Chief Justice Roberts will assign the opinion to himself for the Court. And the reason I'm confident he will is that he is thinking of the long run. He does not want to establish a constitutional doctrine that says 50 years, 30 years from now Congress cannot deal with national problems in any way other than having a single government, monolithic, bureaucratic solution. He's not going to want to constitutionally rule out the idea that Congress can resort to incentives for people to use a market-based

solution.

Last tiny point. It would be true that if the Supreme Court upheld this law, then there would be no limits and Congress could do anything. If they upheld it in an opinion that said we're upholding it on the following principle: There are no limits and Congress can do anything it wants to. But there is no chance -- none whatsoever -- that that's the opinion the Court will write. Instead, they will say this deals with one-sixth of the national economy. It is not a local matter, and it involves a matter where 90 percent of the hospitalization costs and two-thirds of the overall medical costs are transferred to others by the uninsured. When that's done, Congress can have a modest financial penalty to encourage people to participate in the market. That's the opinion they will write, and the heavens will not fall.

MR. GALSTON: Making a promise in the presence of 150 witnesses is always rash.

Ilya.

MR. SOMIN: I make no guarantees or promises. I would merely say that if the Supreme Court did what Walter Dellinger says that it will do, it could do it but it would be wrong, and that is I think the crux of the debate. The Supreme Court is not always right; rather, the actual law is not what the Supreme Court says but what the Constitution says, and I've tried to explain what the Constitution says is inconsistent with this law

Now, I also think that upholding this law is not required by anything the Supreme Court has said so far. So, in this few minutes, I'd like to focus on a few key points.

First, I'd like to single and agree with something that Sy Lazarus suggested, which is that if you uphold this law, and if you follow the logic of their argument, there will be no limits on congressional power other individual rights restrictions, specific individual rights carved out elsewhere in the Constitution.

Now, as I think Sy would agree, the Supreme Court has never enunciated an individual right that says you have a right not to be compelled to buy products that you don't want; therefore, under this approach, if this law is upheld congress wouldn't in fact have the power to mandate the purchase of any product of any kind.

Now, the second point that I would want to focus on here is the issue of the existing case law. As I mentioned earlier, there is a lot of case law, which in my view expands the power to regulate interstate commerce beyond the text and original meaning of the Constitution, but without exception every one of those cases dealt with some kind of preexisting economic activity that includes, by the way, 1944 case which said that they have the power to regulate insurance. What they meant by that is they had the right to regulate insurance companies who sell insurance, i.e., preexisting economic activity. They did not say that they have the power to force insurance companies or force ordinary people to

open up an insurance company and start providing insurance, nor did they hold that people have to purchase the health insurance if they don't want to, or any other kind of insurance.

A third issue that has often been cited in this debate is the question of free-riding that, well, the people who oppose this law -- they just want to be able to free-ride on the system. I would know that there are many other ways to prevent free-riding. The simplest is for the government to simply say that if you can afford health insurance but choose not to buy it, then you're not in fact going to be provided free service by the government. (inaudible) notice that the free-riding here to the extent that it exists was created by Congress itself through its laws requiring providers to give free service in certain situations, so if this justifies the individual insurance mandate that again there's no limit to Congress' powers, because Congress would then have the power to crate the so-called free-riding problem that it is trying to solve. So, there are many other ways to, in fact, prevent this sort of free-riding to the extent that it does exist.

Now, I would note also that it is true certainly that there are often lawyers who cite slippery-slopes that have little chance of coming about neutrality. In this instance, however, there is a real chance, because there is, in fact, lots of powerful lobbies. It would be happy to try to get Congress to force people to purchase their products.

Walter Dellinger says, well, why hasn't this happened at the

state level. I would note that there actually are numerous purchase mandates at the state level for many different kinds of insurance. To the extent that there aren't more, it's because people have the ability to exit from states. If Virginia's regulations are extremely onerous, people can move to other states. Exiting the United States is a much tougher proposition, so there is a greater threat, I think, if Congress has this power than if state governments do.

Finally, I would note the issue of redundancy. It's interesting that Walter Dellinger does seem to acknowledge, to some extent at least, that this would make many of the powers of Congress redundant, but he says well, this would just be the result of the growth of the national economy. I would note that economic interdependence of this kind is a not a new phenomenon. The framers were well aware of it. James Madison himself wrote in the early 19th century about how there is economic intraconnections between people in all sorts of different ways. And so if this approach was taken -- the interpretive approach favored by our opponents -- if it was taken in the early 19th century and the 18th century, very similar results would occur. Walter says well, if you got sick in 1787 that didn't have an effect on people out of state. Sure it did. You probably bought less products than you would if you weren't sick, you worked less, you contributed less to the national economy, and so on. So, there was tremendous economic interdependency in the 19th century, not just today.

So, I would, in closing, say that no argument offered by the federal government in this litigation or by our opponents today would justify this act in a way that doesn't lead to giving Congress unlimited power to mandate anything of any kind. I think that poses both an important risk in the real world of slippery slopes, but it also makes a hash of the text of the Constitution if Congress were given this unlimited power by the commerce clause. First, if that were understood at the time, the Constitution would never have been ratified; and, second, there would have been no need to write most of the rest of Article I.

So, on that note I think I'll close, and I thank you very much for coming here to listen to us.

MR. LAZARUS: Thank you.

Ilya, I just want to clarify. I appreciate your stating my argument again, but I just want to clarify that what I was saying was not that there are no limitations in the Constitution on the commerce power other than the Bill of Rights. Certainly they are. They are within the logic of Congress' commerce power as defined by the Courts since Chief Justice Marshall, but those limits are pretty generous and I think all of us know that.

With respect to the Bill of Rights as a robust protection against abuse of the commerce power, I think we should just look at what is at issue in this case. What you all are saying is that requiring people to carry a minimum level of health insurance under current

circumstances and within the context of this statute and the other laws that we have governing the delivery of health care that that is such a -- that is essentially a horrible invasion of individual liberty. And I think what I am trying to say is that under existing law we have a framework for evaluating that claim. It's a perfectly sensible framework. And when you put a spotlight on the nature of this liberty interest, as Walter has explained in some detail, it shrivels as an important liberty interest. It couldn't possibly qualify as a fundamental liberty interest or a fundamental personal liberty right. And it shouldn't. And, again, I pay reference to what Governor Romney said, so I think that if you use the existing framework for balancing an asserted liberty interest against Congress' exercise of the commerce power, it would be a perfectly sensible framework. It would result in a clear ruling that this liberty doesn't measure up to what it takes to defeat a rational exercise of Congress' authority.

So, here we are. The people challenging the mandate are trying to work a radical change in existing law and one that really isn't necessary and isn't a very good one.

I'd like to mention a couple of -- one other point, and that is we need to think what the consequence is of accepting what this radical change in the Constitution could be for other laws and programs that are terribly important. And just to be very -- to deal with it on a stratospheric level, basically reading the necessary and proper clause out of the

Constitution as an independent source of congressional authority would have consequences that are really incalculable because that hasn't been the law for 200 years, and there are any closed cases that we could identify that would go the other way. But it wouldn't take conservative or libertarian legal advocates a clever as the ones seated strangely to my left --

MR. SOMIN: We are stage right, Sy.

MR. LAZARUS: Stage right. Well, there's that, to your right. (Laughter)

It wouldn't take them a great deal of time to figure out some very intriguing cases to bring challenging and all sorts of laws, I'm sure. So, the necessary and proper clause point of the opponents would very likely trigger an explosive set of challenges to major existing programs.

Secondly, turning the activity versus inactivity distinction into a very important rule of law would also have consequences. An obvious target would be laws prohibiting discrimination by private individuals in all sorts of situations that we're all very familiar with. To be fair, David and Ilya and those who agree with them have that forbidding employers or hotel keepers from discriminating is not the same thing as this, because those people are engaging in preexisting -- in pre-initiated activity that triggers their responsibility not to discriminate. But that distinction wouldn't hold up terribly well, I think, if you looked at exactly what is going on in the health care and health insurance markets.

As Walter has pointed out -- I think he said 94 percent of people who are uninsured have used the health care system, so they really are active in that sense. Sixty-two percent, as I understand it, of those people used the health care in the preceding year. So, when you compare that situation to people who are refusing to do business with people because they are of the wrong race -- I don't really think the distinction is that clear-cut, and I'm sure that, again, people who oppose laws against discrimination would be in court pointing that out.

The same kind of distinction, the same kind of argument would be made to challenge environmental laws that impose liability on people who don't really do anything, such as homeowners under the Superfund law, under Clean Water Act.

And, finally, just one last statement. I think that the most pernicious principle that would be let loose into the law by this decision is this notion that there's some kind of free-floating libertarian interest that can be inserted into the commerce clause through this necessary but improper argument and used by judges of varying political persuasions to trump all kinds of other statutes, which would include, by the way, Medicare taxes. It would include Social Security taxes. It would include the Massachusetts or any other state individual mandate requirement. So, we should all think about what those consequences are.

Thanks.

MR. GALSTON: Well, thanks to Team A and Team B for

such clear and concise presentations of the arguments for and again the proposition. Acting in my capacity as Hobbesian sovereign, I am going to call a two-minute audible before getting to audience questions. I am going to give David Rivkin one minute to make a point of what he regards as correction of misimpression that he believes is fundamental, and I will give the negative team one minute to respond; and then we will proceed to your questions.

David.

MR. RIVKIN: Thank you, Bill. Nothing illustrates better the difference between two sides is continued reference to liberty interest and libertarian interest. That's got nothing to do with it. Liberty interest analysis as used in the government is acting -- a particular government or entity -- is acting within the scope of its proper powers, but it's doing it in the wrong way. The essence of structural limitations on governmental ability to do things is you don't get to that. If a government cannot do things in the first place, it's not a question of liberty interest, how fundamental it is; it's a question of its acting void of an issue.

The only other thing I will tell you is we heard many times and all their limitations in the commerce cause, never richer and (inaudible) articulated them. And I feel sorry because you cannot do that. The government has tried it now for a year and a half. You cannot articulate them. And every single commerce case going back to Gibbons and all the way to Raich, not just Lopez, not just to Morrison, says they

have to be meaningful judicially, enforceable limitations on the government's ability to use that power. That's what's at stake here.

MR. DELLINGER: I have no doubt that the distinction between structural limitations and liberty protections is a real one, and they're separate. I just find this to be unremarkably a regulation of commerce and therefore within the structural authority granted to the national government by the Constitution to regulate something which is so clearly a matter of national not local interest and which is, moreover, so clearly economic and purely economic rather than personal. This is not a regulation whether you must or must not use contraceptives. It's purely an economic regulation that has national consequences and therefore even recognizes the importance of structural limitations. This seems well within it.

MR. GALSTON: Okay, it's now your turn, starting with questions from the press and then moving on to the audience.

Stuart Taylor.

MR. TAYLOR: Is there a mike?

MR. GALSTON: Here it comes.

MR. TAYLOR: Hi. Stuart Taylor, no institutional affiliation worth mentioning. (Laughter)

I have an argument question for each side, but I'll be happy if I can get the first one out, and I'll throw it at Walter Dellinger.

You make a very powerful case, I think, that the individual

mandate is no more onerous in affirmative obligation than the Social Security and Medicare taxes and puts us on no more slippery a slope. But I wonder whether this line of argument funs afoul of what I will call the non-deception corollary of the no-taxation-without-representation principle.

To be specific, the President and Congress went to great lengths to convince the electorate that this is not a tax. Why? Because the electorate tends to take notice when told we propose to impose a new tax on you. I think that's why the Constitution says tax bills have to originate in the people's house.

In addition, Article I, Section 8, says Congress may regulate commerce among the several states. It doesn't say Congress may impose affirmative financial obligations, otherwise called taxes, in the name of regulating commerce among the several states; and I think the necessary and proper clause doesn't say that either.

MR. DELLINGER: Well, Stuart, the necessary and proper clause gives Congress what Justice Scalia says is the authority to enact those regulations which bear -- are reasonably adapted to the attainment of a legitimate end under the commerce power, okay? That's Scalia recently.

Nobody has ever disputed the proposition that an act of Congress says that insurance companies may not forbid -- may not preclude the sale of insurance to people based on preexisting conditions

or their children's condition -- is a regulation of commerce among the states and that when you impose a regulation that companies cannot decline to sell their products, there has to be some incentive to get people to go into it, and a 2½ percent financial penalty seems to be such a perfectly calibrated incentive that it seems to me to be -- there's complete truth in labeling.

This is an -- whether you call it -- whether you're an opponent of the taxing power or not, it's in the statute that you have to pay a 2-1/2 percent penalty if you don't maintain minimum coverage. It's really no more striking than the requirement to have automobile liability insurance. And then we'll have this theoretical activity -- inactivity, but the fact of the matter is we impose liability insurance and surely could do so nationally because of the national commerce laws if we chose to.

We pose liability insurance because no one can be assured that they won't have an accident that imposes costs on other people. And as our national health care system is structured in the real world, no one can be assured that they're not going to impose costs on other people if they're similarly uninsured. It seems to me it's just perfectly remarkable to have a requirement like that.

MR. RIVKIN: It's a perfect example of a rope-a-dope argument. Nobody is suggesting that the federal government cannot regulate insurance companies. Nobody is trying to overturn their (inaudible) plan. You can impose the requirements of the automobile

manufacturers to sell any cars you want. It has nothing to do with mandating that people buy the damned thing. That's what's not all about this. And the notion that unless you force people to buy it you're going to cause the poor dears' insurance companies, which I hold no candle here, to suffer losses, it happens all the time. And if the losses are distinctive and large enough to amount to regulatory taking, they can get money from they Treasury.

But there's absolutely no connection between regulating the business of insurance -- and, by the way, under the necessary-and-proper clause, as Ilya said, as the case law makes very clear, they have to be not really necessary -- useful, helpful in doing what -- in making the exercise of enumerated powers work. Work in what sense? If you look at Raich, for example, in the sense of not being circumvented, in the sense of not being evaded. Nobody has made any argument -- and the government has tried -- but insurance companies would evade the mandates ala Darby, which is a famous N&P case where imposed requirements in companies then under the commerce clause (inaudible) under N&P. Keep records so we know you're not evading it. Nobody is suggesting insurance companies would not be complying with this. What the government is saying is it wouldn't work the way we want.

But under that logic, if what you really want to use necessary clause is to correct the downstream consequences that you don't like, if you want to go through a scheme, the necessary and proper

clause becomes the front of unlimited power, because let me tell you, ladies and gentlemen, 90 percent of the time the government does not get what it wants when exercising enumerated powers. (inaudible) may have perverse incentives. The more ambitious, the more overarching the exercise, you go and exercise overarching powers. If you want to have American Help and Prosperity Act of 2012, and then you have few feeble efforts to get it done and, guess what, there's no prosperity, there's no happiness, then you can have unlimited mandates under the necessary and proper clause. That's not how it works, even under the most extreme and capacious interpretation of the necessary and proper clause. So, it has nothing to do with regulating insurance. It has nothing to do with regulating contracts. It has everything to do with requiring individuals to purchase something.

MR. GALSTON: Another press question.

MR. MITCHELL: Thanks. Garrett Mitchell, and I write *The Mitchell Report*.

I want to try a proposition here, although given the remarks of Counselor Rivkin about utterly specious and later Counselor' Dellinger's notion of half-hearted, I'm not sure whether this will work, but I want to try it anyway. It comes from the observation made many decades ago by the physicist, Niels Bohr, that there are two kinds of truths -- small ones and great ones -- and that the opposite of a small truth is a falsehood and that the opposite of a great truth is another great

truth. It is my sense that what we've been treated to today are a series of dueling great truths. That's the proposition. A, if you accept it, what I would like to hear is for each side to articulate, in a sentence or two, not referring to clauses in the Constitution, case law, et cetera, but something that I could, for example, take with me across the hall and sit down with a group of high school students and say this side said the great truth was X and the other said why. So, I would be interested to know whether the A team can articulate the A team and B team's great truths and whether B team can articulate the B team and the A team's great truths.

MR. DELLINGER: I would say our great truth in a sentence is this. Where, in our country, you have these two contending propositions that the great tiebreaker is which one has been adopted by people elected by the people of the United States of America rather than five guys appointed for life.

MR. SOMIN: I would say our great truth is that the point of having a constitutional democracy is that government's powers are limited. They can't simply do anything that they people, whether elected or not, believe is useful or convenient or helpful to achieving their ends. If they could do that, then that is a great danger both to the system of constitutional government and also to the liberties of the people.

MR. GALSTON: Okay, I'm now going to start at the front and then move to the back and then go back and forth in the name of

being fair to everybody.

So, gentleman in the black shirt.

MR. WITTES: Ben Wittes from Brookings.

I have a very brief question for both sides. My question for the non-constitutional side: You guys repeatedly refer to alternative ways to get this done, and I'd like to throw one out at you and see if, A, you think it's constitutional and, B, if so, whether you would, as a matter of constitutional hygiene, support its adoption. That is, the federal adoption has undoubted spending power, and as you describe it the state governments have police power. So, could you lash the two together and simply require as a matter of state receipt of health care dollars that they adopt state-level individual mandates and thereby effectuate a national individual mandate not using the commerce power.

On this side, I want to return to Walter's telephone book of products that are obviously not covered if you uphold this, and I want to propose one that arguably could be and see how far down the slippery slope we get. This is compact fluorescent light bulbs. So, they use a lot less energy. As a result, we put out a whole lot less carbon dioxide if people use them. There's a lot of cost shifting when you don't use energy, that if you use incandescent bulbs you would be using. So, what if instead of regulating the manufacture of light bulbs and requiring a certain degree of energy efficiency? Congress required that two-thirds of light bulbs that everybody purchases have to be compact fluorescents.

How would upholding this statute affect the constitutionality of that one?

MR. SOMIN: So, I certainly think under current precedent your scheme for using the spending power would be upheld I think because Congress has said -- not Congress, the Supreme Court but also Congress has said the federal government has power to impose all sorts of conditions on federal grants for state governments. I would note, however, two things. One is in various academic writings, I think I've criticized some elements of the current jurisprudence, so I think if the jurisprudence for what it should be rather than what it is the outcome might be different.

Second, I think as a political matter, it's actually not that likely that Congress would do it this way, because you might ask well, why didn't they simply do it this way in the first place. They didn't for two reasons. One is they would have to give state governments a lot of money to accept this offer and someone might refuse -- those that didn't like it. Second, the state governments would then would have to share the political blame for the enactment of an unpopular mandate and many state governments might not be willing to do it unless they got probably a lot more money than Congress would be willing to give them. So, this is a path that is permissible under current Supreme Court precedent. It's not likely that the Supreme Court will change that. But it's also a path that would have significant political and fiscal costs for Congress. I think that's -- those are reasons why Congress has not done it.

The reason -- however, it's interesting to consider the question of why not simply have individual mandates at the state level? If an individual mandate is really a great way to solve this problem, nothing prevents individual states from adopting it as Massachusetts has. The fact that they have not, the fact that even other liberal states besides Massachusetts have not done it, I think is some indication that perhaps this is not actually the best way of doing this. People might say, well, interstate competition would prevent them, but if this is really such a great way of reducing health care costs and increasing access, people would flock to the state that has this mandate rather than leaving it. And certainly insurance companies would be happy to do business in a state which requires people to buy their products.

So, the sky does not fall if Congress cannot do this. If an individual mandate is such a great idea, individual states have the power to do it, and if it really does work in the way that it's advertised, they would have tremendous incentive to do it as well.

MR. RIVKIN: At the risk of demonstrating that there are some potential agreements even on our side, it would constitutional problematic, not because of the commerce clause and not because of a teaching of *South Dakota v. Dole*, such as it is, about compulsion, but if you look at the *New York & Prince*, there's a fundamental problem compelling one sovereign, i.e., the states, to do something and exercise what is clearly their power as a condition of receiving some fragile

largess. The difference between that and requiring the states, for example, to adopt particular regulation of a clean air act and particular regulation in the Medicaid area is because what you're doing there is you're nudging their regulatory power to implement a federal scheme. But I cannot think of any example where you are actually asking the state to affirmably pass new legislation a la New York, which (inaudible) nuclear waste, that did not have this problem.

And if you look at language in New York & Prince, the core constitutional value is accountability. You heard me say earlier about -- you know, I didn't use the word "weasely" in this particular debate but often referred to congressional inability to pass a true tax as "weasely." This is also fundamentally weasely, because it distorts accountability. The people should know which sovereign is doing what to them, and having one sovereign squeeze another sovereign to do it to them fundamentally undermines that that is the broader the teaching of New York & Prince.

MR. WITTESS: Can I just say I agree with -- I think I agree with David's point about the problematic quality of forcing or even incentivizing states to adopt laws where Congress is not taking political accountability, and I will pass to Mr. Lazarus to respond to the notion about the requirement that people buy these light bulbs that I have a hard time reading under. (Laughter)

MR. LAZARUS: Ben, I think that there's a simple answer to

that question, what Congress would do if it wanted to get to that point and it might -- would be to set standards for light bulbs that could be sold.

MR. SOMIN: But the condition of the hypothetical is that Congress wanted to avoid doing that and wanted to create a mandate instead. I mean, make it parallel to the current situation.

MR. LAZARUS: Well, I think that would be a very cumbersome way to proceed. I doubt that Congress would do it. I think it would be possibly susceptible to an attack, that there are other ways to get this done that are less intrusive, but it might be upheld. But just again, I think it's in the category of slippery-slope hypotheticals that are really not very plausible.

MR. DELLINGER: Yeah, I think the answer may be sure. I'm not -- you can take the 3,000 goods and services and you may find another one where you can make a similar compelling case about the external effects on other individuals on other markets that come from individual choices and indeed impose a -- you certainly could to show how little liberty is as stake. You certainly could have a tax credit for people why equip their houses in a more energy-efficient way. I believe we have lots of tax credits like that. I think there's no constitutional reason why Congress couldn't impose the penalty, not justify the taxing power but just under the commerce power could have an additional small penalty on those that do not, you know, convert to a different kind of

lighting. I think that's -- I would -- I'd have to see whether the arguments can be as fully developed as they are with respect to the external consequences on the national economy and the transfer of cost of health care. But I wouldn't rule out there's some other product that you could make the same case for. If you make the case, fine.

MR. GALSTON: Okay, I don't want my poor eyesight to get in the way of fundamental fairness, so I -- there's a hand in the back there.

MR. HABERCORN: Thank you very much. I'm Jen Habercorn with Politico.

Mr. Dellinger, you mentioned that you're fairly confident Chief Justice Roberts is going to uphold the constitutionality, and I'm wondering if you can expand on that a bit, if there's something he's written in the past that makes you think that, and if there are any thoughts that made you decide that --

MR. DELLINGER: Well, to answer the very last part of that first, yes, he did join with Justice Breyer's opinion in the recent *Comstock* case, which gave a fairly broad read to the necessary and proper clause when everyone saw this case on the horizon, so in that narrow sense I could point to a doctrinal point. But I think it's much larger.

This is really a very large issue, that it is a great and awesome case if they were to strike it down. If they treated it as just another exercise of the commerce power it's not a great case. But I look

at what happened in 1937. The court that rejected the constitutional challenge of Social Security, which had the same libertarian underpinnings. People should be allowed to make their own choice about how to pay for their own retirement. They shouldn't be forced by the national government to take funds out of their salary and put it aside.

When that case was made, it was made to a very conservative court that did not yet have its first Franklin D. Roosevelt appointee. And yet that court stepped back from invalidating Social Security, realizing that was just a bridge to far for judicial review.

And, secondly, I do think that while Chief Justice Roberts I think is both jurisprudentially conservative and favors conservative politics, I think he has got a very long-range vision of where he sees his jurisprudence going. And it's not one that says that Court should take cases where it's not even ripe and it's hard to know if there's even an individual that's got an active controversy and it should leap in at this point, should issue a novel ruling, invalidating an act of Congress; and particularly I do not think he wants to say that there's something wrong with creating financial incentives to using free-marketing systems and the only option is going to be to use monolithic governmental approaches. That would be fine with some liberals, but I don't think it's going to be fine with Chief Justice Roberts. So, I see no reason why he would want to impose that very act of this constitutional straightjacket on how Congress goes about regulating matters that affect the national

economy.

MR. LAZARUS: And if I could one little embellishment to Walter's point, in his confirmation hearing, Chief Justice Roberts very expressly disavowed the *Lochner* era, state of the *Lochner* decision that if you read the decision you can be clear that the justices were making law, not applying the law, and he, like other mainstream conservatives, has consistently considered that type of jurisprudence as illegitimate activism in those terms. I think what we see in these cases, really, is a move by the libertarian strain of conservative jurisprudence, which had been a very marginal factor up until very recently, to supplant the emphasis on judicial restraint that was the hallmark of conservative judges and legal advocates up until now. And the question is whether the chief justice and his colleagues, such as Justice Scalia and Kennedy, will stay true to their emphasis on judicial restraint or trade it in for a new model, which is really a very old model, and I agree with Walter, for what it's worth, that I think that they won't.

MR. GALSTON: I saw another question in the back. Yes, gentleman in the corner.

MR. BURRUS: Trevor Burrus from the Cato Institute.

Sort of going off your point here. Keeping in mind that the limitation on the powers was primarily to protect rights. I'm curious about whether or not there's any applicability of *Glucksberg*, who seems to strongly imply that there's a right to refuse health care in that case, if not

legally necessary possibly philosophically whether or not the inverse of requiring you to purchase health care but allowing you to refuse it would be -- the inverse of that would be onerous restrictions on the right to have an abortion, for example.

MR. DELLINGER: I'm glad you put *Glucksberg* on the table. I argued *Glucksberg* to the United States. That is the case which dealt with physician-assisted suicide, and in the course of reaching that decision the Supreme Court made manifest what it had earlier suggested in *Cruzan* that there is an individual liberty interest in refusing unwanted health care. And the reason I think that's important part of the debate is that it is one of the limiting principles that you can invoke for people who are concerned about what Congress can do. There is a line of cases, and if you talk about requiring people to exercise or eat broccoli or even accept health care, I think *Glucksberg* and *Cruzan* stand in the way and impose a limit on the ability of the government to impose that kind of restriction, even if it would otherwise come within the commerce power. And that just emphasizes how different this is rather than forcing unwanted medical treatment on someone.

This is a 2-1/2 percent penalty. They usually put aside justifying it under the tax power. Just how it operates -- it's a 2-1/2 percent penalty -- is purely an economic matter, and it's not a local matter. So, I think you want to have a follow-up, because I think your question may have had the reverse suggestion to it.

MR. BURRUS: Yeah, with a similar penalty on acquiring an abortion in the sense of if you had a 2-1/2 percent tax, similar penalties on someone's ability to require -- see, we're not actually forcing you to --

MR. DELLINGER: It's quite dramatically different, and it goes to show that some of those who are opposed to this actually would regulate people's use of contraceptives or ability to have abortion, which does seem to some of us deeply intrusive in delivery. Both sides of this are an economic transaction. You either -- you don't have to ever use your health insurance. You just have to maintain coverage. You have pay a premium for the insurance or you pay the tax penalty. That's all. That's like auto insurance. It's like the Social Security tax. It's like Medicare. It's no more intrusive than that. And that seems to me to be so many light years and standard deviations removed from an obligation that would involve your personal integrity and what you do, whether it's anything from exercise to abortion.

MR. BURRUS: So, would some level of taxation implicate the right to refuse?

MR. LAZARUS: Sure, absolutely. I think that's right. But right here, what you're refusing is itself. What you want to refuse is itself merely an economic transaction of maintaining insurance coverage. You can get it from a private company or from some state insurance exchange. That's all you have to do.

I think people have the idea out there that black helicopters

are going to descend from the sky and ninjas are going to go into your bedroom and force you at the point of bayonet to go to the insurance brokerage, when actually all you have to do is either pay the 2-1/2 percent additional surcharge on your income taxes or maintain minimum coverage. Purely economic.

MR. SOMIN: So, two things. It may be that *Glucksberg* and their interpretation of it can prevent the congress from forcing people to use the health insurance or use products they bought, but nothing in *Glucksberg* or any other case in this area would prevent Congress from forcing people to buy products of any kind if the other side's logic and their interpretation of Congress' powers in this case is accepted. So, it may not be much comfort to people if Congress has unlimited power to force you to buy any products, whatever it wants. But they say, well, you don't have the product, you just have to buy it.

Second, even with respect to using it, it's not so clear to me that Congress -- I'm sorry, that *Glucksberg* covers that, but *Glucksberg* says you can refuse unwanted health care. It did not say that you can refuse physical intrusions of any kind, so a future court could, say, well, force you to eat broccoli or exercise in a gym or whatnot. That's not as intrusive as forcing you to allow surgeons to operate on you or provide painful end-of-life, which is what was going on in *Glucksberg* itself. Maybe a future court will say things like that, but at least under current precedent has not.

Lastly, I think the other side has emphasized well, you know, this is like *Lochner*. It's not like *Lochner* the Court said that any level of government could not force people to limit their economic transactions in various ways. Here what we're saying is that this is outside the powers of Congress. Some of it may be within the powers of individual states. But preventing Congress from imposing this on everybody protects both individual liberty and limited government in important ways, because at least if a state does it, people have a choice as to which state they live in and there is competition between states, whereas if the federal government imposes it on everybody the only remedy that you would have is to leave the country entirely. So, the bottom line is I think I would not take a lot of comfort in cases like *Glucksberg* if you're worried about these sorts of impositions. At best, they might prevent from being forced to use certain products in a way as physically intrusive as very unpleasant medical care, but it certainly would not prevent Congress from forcing people to purchase the products in the first place.

MR. RIVKIN: Just to add one point, and I (inaudible), it underscores, again, how different analytically the two approaches are. One, the Bill of Rights-driven approach, which meant to discipline governmental power but otherwise can be exerted, and the structural separation of powers issue. And it's not a deficit or liberty or liberty gap and you sort of try to put a little bit of restraint from column A and a little

bit of restraint from column B. They're totally independent analytical frameworks.

MR. GALSTON: Yes, the woman right in the middle there.

MS. TURNER: Thank you for this excellent debate. I'm Grace Marie Turner of the Galen Institute.

Mr. Dellinger, you -- a couple of things -- continue to refer to the taxing authority of the federal government as a justification for Social Security taxes but yet we're really talking about the commerce clause, so I would just sort of like that disconnect to be addressed. But even more, you refer to the penalty for not purchasing health insurance as trivial and no big deal, the 2-1/2 percent. But one of the reasons a number of political have shown that people really object to this is because of the cost of the insurance that people are going to have to buy if they don't -- if they decide to purchase the insurance, which according to the Congressional Budget Office could cost $20,000 for a family by 2019, which could be the first or second most expensive item in their budget. And that is not trivial. And most people think if it's a federal law I should at least to abide by it. And for those people for whom subsidies are not going to be available, this is not trivial.

MR. DELLINGER: You know, I -- yes, I think that your point is very well taken, and what I mean to say is that it is not of a level that -- 2-1/2 percent is actually less than, as you know, what it would likely cost to maintain minimum insurance coverage. That is not meant to be an

onerously punitive imposition, because compared with the cost of insurance, it's relatively small. You know, there is a precatory requirement that everybody have insurance, but the fact of the matter is it does give you a choice of simply paying the 2-1/2 percent rather than having the health care. And there are exemptions for those whom it would be a financial hardship.

The point I'm making about Social Security is not that it's an exercise -- I understand this is an exercise of the tax power, not the commerce power. I'm using it to make the following point. This regulation is, in my view, undoubtedly a regulation of commerce, and so the question is whether we should carve out an exception because it's so intrusive. And when you ask that question, it seems fair to compare it with other impositions under other kinds of powers like Medicare, automobile insurance, Social Security. These are just matters where we're required to make financial impositions in order to provide some economic basis for future use. So, I think the fact that this is less intrusive than Social Security, it's self-justified under a different power to be sure. Because this is less intrusive to Social Security, it gives you more choices. How can it be so shocking that we have to assume that we have to find some exception to Congress' power to adopt this mandate?

MR. LAZARUS: And if I could just add one really quick sentence, I think that we would all -- certainly I would -- I'm sure Walter

would feel that there was a serious constitutional question about requiring people to make a level of expenditure that really would be financially, incredibly catastrophic for them. So, we would all -- I would certainly agree with that. But Congress has bent over backwards in this law not to have that happen. Now whether it's been successful or not is a question I don't know, and I also wouldn't want to see the Supreme Court getting into unless it was really very clear.

MR. RIVKIN: And what is ironic is that President Bush and I believe in some accounts -- haven't it myself -- Congressman Ryan -- have proposed for Social Security using something very much like the individual mandate. That is, instead of allowing people to -- Congress would impose the same requirement that you spend 7-1/2 percent, but you could direct a portion of that to making your own private purchases so that the individual mandate approach is what has been offered as a partial substitute for Social Security as a conservative -- more conservative approach to retirement income. Am I wrong?

SPEAKER: It's also very close to Medicare advantage plans, by the way.

MR. SOMIN: Just to --

MR. GALSTON: I would like her to follow up, because I think she thinks that's --

MS. TURNER: No, I think that the fact that Social Security taxes are settled policy and that Congressman Ryan is simply giving

people a different way of allocating those taxes -- it's not a new mandate.

MR. DELLINGER: Well, it uses an existing mandate and directs you to the private market, but that's -- I -- okay.

MR. SOMIN: Just a brief comment on this point. They emphasize well, this is not a very big fine, but nothing in the logic of the federal government's argument in this case turns on whether it's a small fine or a big one. If it's constitutional at 21/2 percent, it's going to be constitutional at 12-1/2 percent, 22-1/2 percent, and so forth, and it's going to be constitutional with respect to other purchase mandates of other kinds. So, certainly I don't think their position is going to be well, the Supreme Court should investigate to see whether this is like a really high fine as opposed to a little one. If constitutional with a little one, it's going to be constitutional with a high one.

Now, I don't want to enter into the debate around the very technical details of Congressman Ryan's plan versus the President's plan or President' Bush's plans that he offered earlier, but I would not that legally speaking there is a difference between an exemption from a preexisting tax, such as the Social Security tax, and imposing a fine as a penalty for violating a regulation. So, Ryan's plan, whether it's a good plan or not, it's simply saying there is a preexisting tax but we'll give you an exemption from it. In this plan, however, there's not a preexisting tax; rather, there is a new fine, which is created as a penalty for violating a regulatory mandate.

MR. RIVKIN: A broader point here, and I should have said it earlier, because both Walter and Richard mentioned Social Security and -- sorry -- and Sy mentioned the Social Security and Medicare. These are taxes, ladies and gentlemen, okay? You can call it Medicare. You can call it Social Security. And as much as we dislike taxes as a policy matter, we cannot pose -- I mean, aside from the question of direct versus indirect and what kind of tax it is, there's absolutely nothing objectionable about Social Security, certainly not as far as I'm concerned. There's nothing constitutionally objectionable about Medicare. All the government is doing is front-end taxing new income and if you have no income you would not be taxed; and to the back-end, relative to Medicare is imposing some conditions on your eligibility to receive a government benefit. That has nothing to do with this case. Zip.

MR. GALSTON: We're now at or close to the end of our allotted two hours, and I would just like to close by making one point and then addressing one question, the same question to both sides in this debate for them to answer as they will.

The point that I want to make is that, interestingly, each side is saying that the other can not take its stand on existing law, all right? Team A is saying that what is being proposed in the individual mandate represents not just an incremental but a qualitative movement forward towards federal government power from current settled law. And

Team B is saying that Team A's position represents a movement back from current settled law towards choose your benchmark -- *Lochner* or any other horrible -- that you would like to parade, and so I find this an interesting sort of mirroring symmetry in the two sides.

Here is my question for both: We're not -- the Constitution certainly includes the phrase "necessary and proper," and so for both teams, what, if anything, does the word "proper" add to the word "necessary" in this phrase?

MR. SOMIN: I think I addressed this in my opening remarks. At the very least proper rules out interpretations of the Constitution which would render most of the most of the rest of the Constitution redundant, at least the parts that allocate powers to Congress. Second, I think proper also rules out any kind of unlimited power to mandate anything Congress might want to impose on people, and it does so for two reasons. One is giving that power would also make much of the rest of the constitution redundant, including, by the way, the power to raise and support armies. After all, the power to raise and support armies or the power to regulate the militia is a power to impose certain kinds of mandates that would be redundant. If you could just do this under the necessary-and-proper clause plus the commerce clause, you could easily say, well, raising armies -- huh-uh, that certainly affects interstate commerce and, therefore, we can do it, we don't need a separate power to raise armies or to regulate the militia.

Finally, as David Rivkin suggested in his opening remarks, the word “proper” suggests that Congress cannot aggregate to itself the police powers of the kind that traditionally, historically have been held only by the states. So, I think much of the position of the government -- the federal government in the case -- is essentially turning the necessary and proper clause into the necessary clause. However, it is in fact, the necessary and proper clause, both in terms of the way that it’s written, and in this case even in terms of the precedent of the Supreme Court. In this area, unlike in some others, the Supreme Court actually got something right, and I hope they will continue to get it right as opposed to reading the word “proper” out of the Constitution.

MR. GALSTON: David?

MR. RIVKIN: Apropos Ilya covered most of it, just apropos of your point about case law. Let me say that I would urge those of you who are interested in this enough and want to read cases look at Scalia’s language in *Prince* that talks a very strong and very compelling way about the importance of preserving dual sovereignty system. And absolute impropriety of any legislation vitiates state sovereignty now. The way state sovereignty was being vitiated in *Prince* and before that or attempted to in New York was by commandeering state officials. But there’s absolutely nothing in that language that suggests that it is a particular mode of vitiating state sovereignty that is constitutionally objectionable, because just like Justice Kennedy’s concurrence in *Lopez*,

it's a very moving ode, if you will, to the virtue of dual sovereignty, and I would submit to you that you can vitiate state sovereignty or dual sovereignty in many ways. One of them is commandeering state officials and conscripting them to do your bidding. Another way of doing that would be to eviscerate any zone of exclusive federal responsibility, which, God knows, has shrunk quite a bit. But if the federal government is exercising --

SPEAKER: You're supposed to say "responsibility."

MR. RIVKIN: Yeah, you're supposed to say responsibility. God knows if the federal government has general police power and it has supremacy clause, it means absolutely nothing, ladies and gentlemen. The states can do it. And if there's nothing you can do without being countermanded by another sovereign, in what sense are you a sovereign? It's a joke. There's no sovereignty involved. And apropos of *Comstock* again, if you read *Comstock* carefully, it countenances a very, very limited use of a necessary-and-proper clause that is fully consistent with all the necessary and proper clause jurisprudence going to *McCullough*. But it's hard, frankly, to have that level of discussion in this setting, but if you look at our pleadings, we go for quite a great length in explaining why the existing jurisprudence fully supports us, and this is not summary turned back to *Lochner*.

MR. LAZARUS: The question is about what does "proper" mean, and so I would like to just point out, first of all, that Justice Scalia

in holding in the *Prince* case that David referred to that David referred to that the federal government couldn't simply commandeer state officials and order them to carry out federal programs without giving the states some kind of opt-out. Didn't need this proper -- this idea that something could be necessary but not proper to reach that result. That result is based on the 10th Amendment to the Constitution in the same way that *Glucksberg* and *Cruzan* are based on the due process clause in the 5th Amendment or the 14th Amendment. So, there aren't really any cases establishing this principle, that the word "proper" is a very significant constraint that cuts against the word "necessary" in the necessary-and-proper clause. That idea comes out of academic literature by creative libertarian colleagues of our friends over here, and it might or might nor become a doctrine that the Supreme Court accepts, but it really hasn't been up till now. I would just say that this case would not be the case to establish it, because once again it would essentially be trotting into the commerce clause this notion of protecting libertarian interests, which up until now hasn't been there and shouldn't be there, but it would be doing so in a case where the interest -- the commerce clause interest is huge, and the person libertarian interest is -- Walter in particular has explained -- is relatively small.

MR. RIVKIN: Just 10 seconds. There's no moving language abut what's proper in *McCullough*? The same passage that talks about what's necessary? I'm confused.

MR. LAZARUS: Yes, but I think that it's also in line with the basic point that Congress -- that clause is basically designed to give Congress the power to select means which are plainly adapted to the lawful ends that they are pursuing.

MR. DELLINGER: One reason we have a necessary and proper clause and not just an all laws necessary clause --

MR. GALSTON: You're cheating. You're reading the Constitution.

MR. DELLINGER: I actually have the Constitution -- is because without it, it was subject to the interpretation that the other limitations on national power, no ex post facto law shall be passed or overridden by the fact that they could nonetheless pass all laws which are necessary. Proper takes into account the fact that there are other limitations on national authority. Here I think you don't need it, because it's a regulation of commerce, and what the Court's opinion could say is we acknowledge -- and perhaps I've too often saying this is a routine regulation. We acknowledge that this is an affirmative obligation. That's a way of regulating commerce. But we need not in this -- and therefore, there may be a more substantial relationship to commerce required. We thus need not reach -- in this case any question by the Congress could require the purchase of a product in order to stimulate the economy generally or promote a particular industry. We need not do that, because here there is a health care system in which virtually everyone

participates. No one can choose not to participate. Ninety-four percent of people are in that market who are insured, and the cost just transferred an overwhelming proportion to others. Because of that, we need not reach these further questions and would not assume the commerce clause would reach that. That's all they have to decide.

MR. GALSTON: Well, please join me in thanking these for splendid for spending two hours with us. (Applause)

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