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**“OBAMACARE UPDATE: IN THE COURTS
AND IN PRACTICE”**

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(Part one.)

MR. TOM FITTON: Welcome to Judicial Watch. I'm Tom Fitton, president of Judicial Watch. We're a conservative, nonpartisan, educational foundation dedicated to promoting transparency, accountability, and integrity in government politics and the law. And through our educational activities, Judicial Watch seeks to ensure that political and judicial officials obey the law and do not abuse the powers entrusted to them by the American people.

So tomorrow marks the second anniversary of the imposition of the Obamacare on the American people. And next week, we will hear historic constitutional challenges to Obamacare, otherwise known as the Patient Protection and Affordable Care Act, but that will occur before the Supreme Court.

Obamacare is an unprecedented government power grab and is a fundamental – fundamental threat to our nation's constitutional order. The challenges being heard next week by the high court seek to vindicate federalism, individual liberty, and limited constitutional government. Many Americans, including thankfully some federal court judges simply reject the notion that the federal government can, for example, force Americans to buy health insurance. As U.S. District Court Judge Roger Vinson wrote who ruled against the individual mandate, it is difficult to imagine that a nation which began at least in part as a result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be difficult to perceive any limitation on federal power and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended. A Constitution in name only. Well, the Founding Fathers didn't intend that, but a Constitution in name only is but one of the awful possible outcomes if the constitutional court challenges against Obamacare don't succeed.

Also, in the meantime, the crisis is ongoing outside of the courts. From the corruption of Obamacare's passing, remember the Cornhusker Kickback, to the controversy of its implementation, which has seen a vicious attack on the Church, waivers to Obama campaign supporters, and taxpayer funded propaganda starring Andy Griffith of all people. And don't even get started on the \$2 trillion in costs and the regulatory webs beyond comprehension.

We have an excellent panel of experts here today, including Florida attorney general, former Florida attorney general, Bill McCollum, Betsy McCaughey, president of Defend Your Healthcare, who's former lieutenant governor of New York, and Lee Casey,

partner at Baker Hostetler. Unfortunately, due to the poor weather conditions, the fog, South Carolina Attorney General Alan Wilson will be unable to join us today.

Each and every one of these panelists is a leader in the battle and we're lucky to have their benefit of their expertise.

First up, before we begin the program, be sure to turn off all your cell phones, before I forget or put them on buzz.

I'm going to introduce now first Betsy McCaughey, who's a patient advocated, constitutional scholar, and as I said, former lieutenant governor of New York State. Her bio is in the materials you have and on our internet. And just let me say generally speaking, Betsy has been fighting this. She fought effectively Hillarycare. She fought effectively Obamacare when it first reared its ugly head in the stimulus project. And obviously, she even made it better once it came up, by calling attention to some of its worst aspects.

What Betsy has done effectively is actually read the legislation and point out some of the problems with it, by referring to the text in the legislation, whether it was in Hillarycare, whether it was in the stimulus package, or whether it was in the Obamacare legislation. And for that, she drives the other side crazy. And she's been one of the most effective advocates against senseless socialized medicine we have and she probably knows more about this issue and has been involved in the public policy fights related to socialized medicine since the days – since going back before the days of Hillarycare.

So with that, I turn it over to Betsy McCaughey.

MS. BETSY MCCAUGHEY: Thank you.

MR. FITTON: Thank you. (Applause.)

MS. MCCAUGHEY: Thank you. I am really glad to be here with you today. It's a historic moment as we prepare to go to the Supreme Court for a constitutional showdown against the Obama health law. And with the U.S. Constitution on our side, freedom should prevail.

This Obama health law forces you to enroll in a one-size-fits-all government designed health plan, whether you want it or not, and more importantly, whether you need it or not. It also broadens the powers of the IRS to penalize you if you fail to comply. And whoever occupies the White House has the authority to dictate what your health plan must include. Nothing in the United States Constitution permits this.

In addition, for the first time in history, this law empowers the federal government to dictate how doctors treat privately ensured patients. So even if you're an Aetna or Cigna and you've paid for the plan yourself, the government is still in charge. The law says that you must enroll in a qualified plan and the law says the qualified plans can pay

only those doctors and hospitals that obey whatever regulations the secretary of health and human services imposes in the name of quality. Well, that can include everything in medicine. When your cardiologist recommends a stent versus a bypass, when your ob-gyn decides to do a caesarian section, your doctor's decisions will be monitored for compliance with federal guidelines. And your doctor could be in the position of having to choose between doing what's best for you and staying in the government's good graces.

You know, women went to the barricades to prevent the federal government from accessing their health records or dictating to their doctors. Now, many women's groups are supporting this law, which does both – accesses your health records and dictates to your doctor. How can it be that a woman is free to choose an abortion but not a hip replacement? Either your body is free from government interference or it isn't.

The president promised that he would make health insurance affordable in order to help solve the problem of the uninsured. But that's not what this law does. You've got in your premium hikes in the mail. Instead, this law vastly expands Medicaid. According to the administration's own projections, nearly one third of Americans under age 65 will be on Medicaid, moving this nation toward a Medicaid nation.

Customarily, states have made the decision about eligibility and benefits under Medicaid, but this law puts the Feds in control and coerces a 57 percent increase in enrollment in Medicaid in Texas, 42 percent increase in Medicaid enrollment in Virginia, for example. Medicaid expansion may be the sleeper issue in this Supreme Court showdown. All the lower courts rejected the Medicaid challenge, but the Supremes saw fit to give it a second look.

Under this law, Medicaid spending will increase from \$343 billion in the last year of the Bush administration to \$900 billion before the end of the decade. How will this enormous increase in Medicaid spending be paid for?

Well, there's \$503 billion in new taxes and fees right here in this law and already in Washington, they're talking about another new tax, the VAT, the Vanishing America Tax, oh, yes. But in addition, this vast expansion of Medicaid is paid for by eviscerating Medicare. The law takes \$575 billion out of future Medicare funding over this current decade and shifts it over to pay for the new entitlements under the Obama health law, particularly the expansion of Medicaid.

Richard Foster, the chief actuary of Medicare and Medicaid, told Congress on April 22nd, 2010, that the cuts to hospitals, the cuts to what hospitals are paid to care for seniors would be so severe under this law that 15 percent of hospitals would be forced to operate in the red and other hospitals might have to simply stop taking Medicare altogether.

Where will seniors go if their hospital stops taking Medicare?

To make further cuts, this law creates the Independent Payment Advisory Board, 15 unelected, unaccountable czars. The IPAB board is charged with further reducing Medicare spending. In a radical departure from Medicare as we know it, Congress seeds its budget making authority over Medicare to this unelected board. The law says that IPAB cannot reduce Medicare benefits, but those are weasel words because in fact, IPAB can reduce the reimbursement to caregivers so low, lower and lower and lower until no one can afford to do a hip replacement anymore.

To halt this attack on our constitutional principles, our liberty, and our health care, 28 states and numerous other parties have challenged the constitutionality of this law. And next week, 26 of those states will get their day in court – or I should say their three days in court, an unprecedented three days of oral argument.

The high court's decision on the individual mandate may turn on one astounding fact, and that fact is this. "Half of Americans consume virtually no health care." That's an exact quote from a federal agency, the Agency for Healthcare Quality and Research – Research and Quality. Yes. Half of Americans consume virtually health care. The Eleventh Circuit Court of Appeals was the only court to directly reject the administration's false claim that health care needs are universal and inevitable. The Eleventh Circuit was also the only court of appeals to overturn the individual mandate. The Obama lawyers argue that all Americans need health care. All Americans are, therefore, in the health care marketplace, engaged in health care commerce, and therefore, all Americans are subject to Congress' power under the Commerce Clause. Congress has the authority to require that they pay for their health care with insurance.

Wrong, said Judges Hall and Dubina, the bipartisan team in the Eleventh Circuit that struck down that mandate. Wrong, they said. The mandate is over inclusive because it applies to people who are healthy and don't need health care and may not need any health care for years to come. Those two judges had the facts on their side. The Agency for Healthcare Research and Quality issued a new report, January 2012, confirming their earlier findings that virtually half of Americans consume no health care. And when you look at the under age 65 group, to which the mandate would apply, it's even way over 50 percent who consume no health care. Half of the population needs only 2.9 percent of the health care consumed in this country, an average of \$238 a year, and many of them consume zero health care in a year, year after year after year.

The Eleventh Circuit Court of Appeals demolished the Obama administration's Commerce Clause argument. And to underscore how unprecedented it was for Congress to attempt to require that Americans purchase a product, they recalled, in 1968, when Congress passed the Flood Insurance Act to try to incentivize Americans who lived in flood plains to buy flood insurance. They never considered requiring them to purchase it. But now, the Obama administration wants to require all Americans, including healthy Americans, to buy the mandatory health insurance plan. That would be like requiring Americans who live on tops of hills to buy health insurance.

So that one pivotal fact that virtually half of Americans need no health care at all shows that the Obama administration's Commerce Clause argument is a flimflam. Let's hope the Supremes agree with reasoning and recognize the facts.

But if they don't, there are several other challenges on the way. Number one, can the federal government dictate how doctors treat privately insured patients. In 2008, the Supreme Court ruled no, when the Bush administration's attempt to dictate how doctors in one state treated patients in one particular circumstance –no, the court said, it would entail a radical shift of authority from the states to the federal government and literally a standardization of medicine in all locations in the country, something the Constitution does not permit.

Secondly, privacy groups are challenging the impact of the mandatory electronic medical records, which create a tell-all relationship with every doctor you see. Have an abortion, your foot doctor will know. See a psychiatrist, your orthopedists finds out.

Religious groups, thirdly, will be challenging Section 1302, which empowers the secretary of health and human services to dictate what your health plan must cover, even if it interferes with your practice of religion.

And fourthly, of course, those provisions of the Independent Payment Advisory Board will be challenged, the over delegation of congressional authority to an independent board and that bizarre provision that IPAB can only be repealed in a little tiny window between January 1st and February 1st 2017. Any Congress can supersede the work of a previous Congress.

So in conclusion, let me say that the authors of the Obama health law disrespected all of us. They didn't trust the public to choose their own insurance plans. They didn't trust doctors to treat their patients properly. They didn't trust states to make good decisions about Medicaid based on what their own taxpayers and budgets could handle. And they didn't even trust future congresses to reflect the true will of the American people. Instead, they accumulated all power in the executive branch in defiance of the principles of our nation, the founding principles of our nation. But fortunately, those principles will be right by our side next week, as we do battle in the United States Supreme Court and with the Constitution on our side, freedom will prevail. Thank you.

(Applause.)

MR. FITTON: Thank you. Betsy. Another leader in this fight is Bill McCollum, who served as – in the House of Representatives for 20 years or so as a stalwart conservative leader, usually fighting his own party sometimes in some of these issues that conservatives care about, but being an effective conservative spokesman to the media as well and a leader in that regard. After that, he ended up as attorney general of Florida. And in that capacity, he led the charge against Obamacare. (Applause.)

And I recall when the lawsuits were filed. And you initially – you filed the lawsuit the day after Obamacare was signed and he was ridiculed and attacked, again, by some of our friends, but obviously our enemies. And – but he thought this needs to be challenged and his innovative lawsuit, not only, as it relates to the – to the individual mandate, but to the federalism issues that Betsy talked about with respect to Medicaid are now before the Supreme Court, and he proved all the naysayers wrong. So we're proud to have here – he's now partner with SNR Denton's Public Policy and Regulation practice, former Attorney General Bill McCollum.

MR. BILL MCCOLLUM: Thank you for that nice introduction and it's exciting to be here. First of all, Judicial Watch is one of my favorite organizations and you've been doing the challenging things for the conservative cause for a long time. And we – I'm just thrilled to be here – we're all greatly appreciative of that and – those of us involved.

I also am happy to be here with Betsy because I know the work she's done. She and I have encountered each other on other occasions. It's delightful to be on the same program with you.

And he doesn't get as much attention as his partner in these articles, David Rivkin – (laughter) – but Lee Casey – I was with Baker Hostetler at one point, not too long ago, before I became attorney general and to have seen that article that I did that you and David wrote and your name's always there with his. I know you're doing the work over there – (laughter) – at least a lot of it. And to see that article which I did, I think in September of 2009, about the individual mandate, is what inspired me to send our team off to do some research at the Attorney General's Office and then ultimately to file this lawsuit, which actually was filed within 10 minutes on the day the president signed this into law, of when he signed it. So that is a great team to be up here with.

I want to do two or three things very quickly because I'm going to try and stay within about six or seven minutes, as requested. I think the most fun of this is going to be you asking questions or our engaging in discussion. And I do want to hear what Lee has to say because of his background.

Let me give you an overall comment, putting in context my views about the big picture bill, and then the rest of it's on the lawsuit. I agree with Betsy about the problems with this bill, but I think what's being missed in a lot of the debate over health care reform, as we call it, is that America has the greatest health care delivery system in the world. And we have been very fortunate with the innovation and the research and all the other things that happened. And it may take three or four or five years, but everybody, regardless of income, regardless of status has been and is a beneficiary of this.

We're in a very destructive mode at the moment, and this particular bill is very destructive. There are three pillars to quality health care – three pillars to really good health care system: quality, accessibility, and affordability. And I don't get any argument on that, whether it's a liberal or a conservative or anybody else who I'm sitting on a panel

with, talking about what are the basic principles of what make up a very good health care system. And what is wrong, though, with this particular legislation, the Affordable Care Act, is that it undermines and it hurts all three: quality, accessibility, and affordability.

So in discussions, later, if you want to go down that road, separate apart from the merits of this lawsuit, I'd be happy to help engage along with the others in that kind of discussion.

The lawsuit itself has several interesting discussions that'll take place next week, which is why we're really here today, Tom, as I understand it, to prelude the Supreme Court arguments, the oral arguments, and of course the decision will occur presumably near the end of June.

The first day, they're going to focus on what's called the Anti-Injunction Act. For most of us, that's very technical. It is very important. It is being argued by an outside group that the Supreme Court asked to come in and do this that because of a couple of lower court decisions – not ours, but in another case or two – that this is somehow a jurisdictional issue and that the penalty, what we call a penalty in here for the individual mandate is actually a tax or it comes so close to being one it's going to be interpreted to fall within ambits of the so-called Anti-Injunction Law. And without getting into great detail, the Anti-Injunction Act provides that if you are a taxpayer challenging a tax law, you can't do that until the law becomes effective, until you pay the tax, and then you basically are seeking a refund. And then you say, hey, it's not constitutional. I need my money back or whatever.

It is a very difficult thing for me to see that at the end of the day, the Supreme Court is going to say, we're going to not hear this case, put it off for a couple of years. It wouldn't be the end of it on the mandate, but it's not ripe and it's not ready. You've got to wait till 2014 and then probably 2015 as a practical matter.

But there are going to be plenty of those who argue for it, a couple of judges whom I respect, who've ruled this way.

So you have to watch it. You have to respect it. Politically, if the judges wanted to do that and by the way, the Justice Department doesn't want to postpone this. The states don't want to postpone it, the court's listening to the jurisdictional issue. But if they politically wanted to just kick the ball down the road, that would be a way to kick part of it down the road. It would not – even if they ruled adversely and said you got to wait for whatever reason under that act, you would only wait on the individual mandate. The Medicaid provisions still they have to decide.

So I really don't think they're going to go that way. I'm not going to take in the weeds and to talk about the Anti-Injunction. Maybe Lee wants to address some of that, but I – I'd be happy – I understand it. I'd be happy to –

(Part two.)

MR. MCCOLLUM: The details of why it just doesn't apply in my opinion to the states at all. I don't know whether they're rule a jurisdiction or not, but it only applies to individuals and I think the states have standing on their own on the individual mandate.

Now, on the merits of the mandate, it is probably the simplest of all the arguments. It is the – got the most attention. It's the reason I filed a lawsuit. But it's the simplest of all the arguments. The simple fact to the matter is that – I can repeat this one time because everybody's heard it many times from me and others. The mandate in here, the essential minimum coverage language, requires you if you don't have an insurance coverage somewhere else to buy an insurance policy or be covered by Medicaid if you're not able to afford it or pay a penalty. And it's that compulsion, that using of the Commerce Clause – it once was an argument this was a tax itself, the mandate. And I don't think that the Justice Department any longer really focuses on that. It's really all about the Commerce Clause. And the question is how far does the Commerce Clause go? How broad can it be? What did the Founding Fathers intend? And it is a powers question. As Lee put it so well in that first op-ed piece, there is no power under the Constitution to do what has been done by this law, by the Affordable Care Act, with regard to individual mandate.

The Commerce Clause is not an elastic. A lot of people for a long time, after the 1930s and '40s decisions thought it was. Very clearly the Supreme Court has set forth that it doesn't find it that way, that there are limits. And if there ever is going to be a limit in this area, it certainly should be here. And the crux of the argument is real – again, real straightforward. If you are looking at this from the standpoint of how does the Constitution – reads that Congress has the power, federal government has the power to regulate interstate commerce.

So we're not going to debate whether it's interstate commerce or not, but we're debating regulating it. This is not regulating interstate commerce. This is all about compelling somebody to engage in commerce, and there's a big difference. And they want to argue, on the other side, all these ways over here and the weeds about this is necessarily improper to the – it's just a way to trying to get around it. And if you really look at this, it's a puny excuse for what they're doing, but obviously some people buy into that, people who want to buy into it principally.

I don't challenge their honor and their integrity and their analysis or their whatever. There are people, I'm sure, who believe and still want to say that the interstate Commerce Clause, after the interpretations that came along 50 years ago, 60 years ago, absolutely anything comes under that – Congress can do anything, but that is not what the court said in recent decisions and I don't believe that's what they're going to say after the oral arguments in their decision in June about the individual mandate.

The other issue that relates to the mandate is severability. Now, I'm going to come to the last one a little bit, Medicaid. And I'm not going to dwell on severability. The severability one is a little more complicated in some ways than the issue with regard

to the individual mandate only because it carries down lots more rabbit holes. But the basic premise of the individual – I mean of the severability issue is what was the intent of Congress. Would they have passed this law, would they have passed these provisions if the individual mandate is ruled unconstitutional without the individual mandate being there. If they knew that couldn't be there to pay for it, would they have had coverage for preexisting conditions? Would they have had the end of the rating system, which means that insurance companies no longer can base their premiums on risk that's involved sorting out who's more at risk than others and making insurance in the health care world really not insurance, like we know it at all and been that way for a long time, really going over there and say everybody's covered.

Now, the reality is I don't think anybody logically would say they would have. And if you look at the whole totality of this law and then we'll begin to look at the Medicaid provisions, which I'm about to briefly review, it seems to me the fabric is so tightly woven that Judge Vinson was right to say, you know, I can't go in and pull out. Which ones – are there 16 or they're 20 or whatever? Justice Department wants you to believe that only two would have to fall, the preexisting conditions and the ones dealing with the rating the risk issue. But there're many other things that are intertwined here. It's incredible how it's intertwined and how you sort all that out from the exchanges, the cost, and all of that, again, this morning, that I'm not going into this talk. But that makes the severability issue more interesting because there will be debate over, not only whether the two provisions I've just mentioned should be severed if the individual mandates falls, because some of course have ruled, of course that that isn't to be severed either. But whether – as Judge Vinson said, the individual mandate is the center, the hub of this wheel, and all of a sudden – (inaudible) – when you pull the center out, the tire or the wheel collapses. And I think it's the latter. And that's, of course, what we want to see the court do, take the whole bill down and remove it.

I think there're a lot of scholars who don't think they will take it all down. They only take parts of it down and then the debate is on parts.

Now, Medicaid, that's one that everybody says the sleeper. Well, I'm going to tell you. When our team researched this, it wasn't in Lee's article, his original op-ed, we thought this was very important. It was important strategically for us, for a whole host of reasons. It was important because the states spend this enormous amount of money and there's a court decision in dicta only that says using the spending powers of Congress, you can only go so far in compelling states to do things. After that, you're commandeering assets. The word coercion and commandeering are not the same and they are – argue the fine points of that and say the Supreme Courts never ruled that – you know – that the federal government has passed a constitutional point of no return, done something unconstitutional in coercing a state attaching something to its spending bill.

I can remember when I was in Congress and we passed a highway bill one year, and in that bill – it was against drunk driving, got a provision put in there that said that states, in order to get their highway dollars had to pass a law that raised the drinking age to 21. And that's constitutional or it's been ruled that way. But the question is how far

can you go. No question that government can do something. But the courts say, hey, there's some point beyond which, you're violating the Tenth Amendment. You're violating the sovereignty of the state. You're commandeering. And that's what this whole argument is about, it's how big this is. In fact, that's what the Dole case talks about, how big it is. If it's big enough, if there's enough money involved, if there's enough whatever involved, the states really don't have a choice. You are forcing them into these rabbit holes.

So let me give you the illustration in our brief that is best, I think, you can do to gain the scope of this. And just use Florida as the example, my state, 2009, \$110 billion in taxes were taken by the federal government from the citizens of Florida, collected, in 2009. The state of Florida collected \$32 billion that year in taxes to run the state government. Of the \$110 billion, about 10 percent – \$10 billion or so came back to the state of Florida to assist with Medicaid. The state of Florida pays about 40 some odd percent of the Medicaid cost under the cooperative agreement that goes way back to the beginning of the Medicaid program. The cooperative agreement having been stretched, then it ties to the federal government in between, but nothing like the Affordable Care Act does.

So now one says, okay, the real issue, the federal government would argue is that states can withdraw. You don't have to take this Medicaid program. You just get on your horse and ride out of town and say we're not going to participate anymore. That's not going to happen. What happens to all the people in our state? What happens to all the money that's going elsewhere to be used in tax dollars to other states? How do we make up for what amount to our share of this – or the federal government's share, I should say, of the Medicaid program. If we want to do this on our own, there'd be about a 30 – 30 percent of our tax increase that you'd have to do in the state of Florida to do that. Or you'd have to give up schools or – I mean it's just – you can start multiplying this and I'm, again, not going to go in every bit of the weeds because there're lots of arguments and lots of examples and lots of illustration, but this is ginormous. Forty percent of all federal grant spending to the states are based on Medicaid. It's a huge number. It's billions of dollars of money every year. And it's a very serious matter. The increase of the actual burden that's in this law on top of what already exists, not just – (inaudible) – already exist today now, what is everybody Affordable Care Act. And what's everybody Affordable Care Act is if someone in the Eleventh Circuit said, well, we're not going to go along with it after listening to all our arguments, we don't think the Medicaid provisions violate the Tenth Amendment because of the amount of money that the states have to put out, isn't that great? It isn't that great for a short period of time, if you're looking at pure money for newly eligible Medicaid recipients. And there a lot of newly eligible. I mean that's a whole argument. A lot of time they've even sued on defining all the scope of what people were after. And the fact that at the beginning of this program states had a lot of discretion. And there were very few people, first of all, in Medicaid originally that – (audio break) – that continues to increase and that goes at the 138 percent of poverty level, has nothing to do with disability or need or anything else, except for the poverty figure.

And – but now we've got this enormous amount of money that is being spent in addition and the states have no way, by the way, of changing the things they used to have discretion over eligibility or cutting corners or costs or whatever under this act. And on top of all of that, it's a big burden. But let me get back to this one point, and that is the federal government does take up a high percentage, most of the additional cost, initially for several years, of the newly eligible Medicaid recipients. But with the individual mandate of the bill, the estimate is that about seven to 10 million people who currently are eligible for Medicaid, who have not previously chosen to join the Medicaid system will come aboard and will become beneficiaries and side up. And there's nothing in the long that alleviates the states burdens for that.

And then there's a provision which is a lot of money. And then there's a provision – additional one – and then there's the provision that says that the states will be required in the future to pay – or assure I guess it's the right way of putting it – to assure that there're enough doctors and hospital beds and nurses and other providers to take care of all these Medicaid eligible people. Imagine the litigation. Judicial Watch – (inaudible) – just defining – they'll never be satisfied – (inaudible) – what's their huge cost. And then there're other hidden things in there as well that I don't think that our team has even raised, probably not wanting to get too far into the weeds and confuse the court, but – and I'll be glad to do that during questions and answers. There're other additional things in the Medicaid area, very intertwined, very vicious.

What happens, states can't afford it. We cannot afford it. And not only can we not afford it. It is the greatest usurpation of federal – state sovereignty under the federal government in the history of country. Individual mandate is about individuals and the states and it's a violation of the Constitution and it goes beyond the powers granted in the Interstate Commerce Laws and it makes the Interstate Commerce Clause become, you know, inelastic, I mean it makes it way – (inaudible). But over here, if you want to think the – (inaudible) – there's never been a time when the federal government ever did anything this big. These things can't get – (inaudible). There's no way they could give up the money and walk away from this and not do this and they're being – the whole thing was designed so that they – the Congress knew they couldn't do that, so they – then they're going to require them to do all these other things.

I think it's a very good opportunity for Supreme Court to draw the line and delimitate exactly where – how far the court can go – I mean the Congress can go with regard to this. Well, that's a hopefully a small – (inaudible) – longer than I wanted to do and it's already extended beyond seven minutes. But thank you very much. I look forward to your questions. And we're going to win, I think. (Applause.)

MR. FITTON: No matter how, the Medicaid fight has not turned out the way you hope. Sounds to me like there's a fiscal time bomb here and that we're talking about the – (inaudible) – crisis in Washington, they intend to take states out with them. That we're all going down the tubes there, unbelievable.

Well, as Attorney General McCollum implied, Lee Casey, with his partner, quite literally, over at Baker Hostetler have done great work in alerting the American people and public policy leaders about the concerns about Obamacare and the individual mandate, because frankly prior to your alerting folks to this – and obviously, it'd been a little bit in the public domain – but there're op-eds, there's nothing better than the Rivkin-Casey op-eds in terms of alerting people in a accessible way about issues related to law and public policy.

The individual mandate was always talked about in terms about whether it was a practical issue or not. And President Obama, when he opposed the individual mandate, running against Hillary Clinton, didn't oppose it on constitutional grounds. He opposed it on practical grounds. And our next guest, Lee Casey, who is over, as I said, at Baker Hostetler, had previously been at the Justice Department, helping the government figure out what stances to take on core constitutional issues and other important areas of law, has developed quite a following through his and his partner's op-eds in the Washington – in *The Wall Street Journal*, in *The Washington Post*, and elsewhere. So he's a leading public intellectual in areas of law. So we're lucky to have him here. And he's a real leader on this issue. And I turn it over to Lee Casey. (Applause.)

MR. LEE CASEY: Thank you. Thank you very much for those kind words. And also, I wanted to, of course, thank Betsy, who has been a leader in this area and against these constant efforts to create some sort of compulsory national health scheme for 20 years or more, and of course – of course, Bill, who it was an honor, of course, to serve as his partner in the practice of law, and he did us the honor – David and myself and our law firm of hiring us as outside counsel to the lawsuit. And it's important to know that if it wasn't for him, we very likely would not be here talking about the Supreme Court argument upcoming, certainly not with the issues framed as they are.

He put together 19 states plus Florida to file that complaint. You have no idea what that means. That means convincing 19 other state attorneys general to join him. Six were added later to give more than half of the sovereign states of this union. The Supreme Court could not – not take this case that I think it was – once that happened, it was unimaginable that the court would not consider the case. But keeping that group together, obviously it sounds very much like herding cats, but not just cats, very large cats. And each of those cats comes with a staff of other cats – (laughter) – all of whom have law degrees. (Laughter.) And so it was no small achievement.

But let me very briefly talk about some of the issues that the court is going to address here next week. First and foremost, and I think there's no doubt about it, this is the most important case about federal state relationships, power under the Constitution in a generation. The core issue is whether the federal government, using the Commerce Clause, can exercise a type of power, which we call a police power, that the Supreme Court, certainly, and I think both history and text of the Constitution also supports, has always said was deserved to the states. The federal government has no general police power. What is a police power? Basically, the way the Supreme Court described it in a leading case is it's the authority to make law pretty much on anything affecting anybody

within your jurisdiction so long as you follow individual limits, liberties, either from the federal Constitution or state Constitution, but it's a general power just to do what the legislature feels is in the public good. The framers of our Constitution denied the federal government that power. They established a federal government of limited and enumerated powers.

Therefore, if the states, for example, want to have – require you to have health insurance, if the states want to require you, as in the case I just alluded to, to get a smallpox vaccine, they can do that using their police power. It's simply a public health and welfare measure and because you happen to be within their jurisdiction, they can tell you, you have to do this or there can be penalties. The federal government can't do that. If the federal government wants to achieve the same result, they have to look at the list of enumerated powers in the Constitution – we have the power to tax and spend, to regulate foreign and interstate commerce, the other powers, and see how they might go about achieving the same result. They may be able to achieve the same result, but they can't just dictate it or legislate it in the way the states can. And of course, over the years, the Commerce Clause has become the basis of clearly the majority of federal regulation that we live with today. The Supreme Court has interpreted it very broadly. It probably was meant, at least at some level, by the framers to be a broad grant of power, because they did want it. Indeed the Constitution Convention was called because the states were regulating commerce among themselves and erecting trade barriers, like smaller European countries. It was a serious problem. But the court has always recognized that there are limits to that power. And the fundamental limit, frankly, is it can't turn into a police power. It can't wipe away the entire constitutional balance and structure and allow the federal government simply to regulate people because they're here and because being here, they have some impact on the economy. Everybody has an impact on the economy. The fact that we're here has an impact on the economy. We're not out buying hotdogs on the street or doing something else. And if that is enough, then Congress can regulate everything. It has that police power. And I think that is frankly what the court will rule.

I do believe that the court will strike down the individual mandate for a number of reasons, but that at the core. And you know, it's interesting, as Bill suggested, it is unprecedented. Congress has never tried to do this before. And if you go back and look, as I've done, to try to find an example, either in our history or in our history before independence and the actions of the British parliament, you are hard pressed. I found no instance in which either Congress or parliament required that you enter a market and buy something simply because you happen to be subject to their jurisdiction.

In the late 18th century, the closest thing I found was, ironically enough, in France, in the old regime in France. And of course, the framers of our Constitution would have considered – did consider that a despotism. God knows it was a gentle despotism compared to what we have seen since, but nonetheless that was their view. And there were two fundamental taxes in old regime France. One was basically a head tax, but the real money maker was a tax on salt. Now, they taxed salt because you need it, both to survive, but most importantly you need it to preserve food. It was the only preservative they had. But that wasn't good enough.

You actually had to buy a certain amount of salt every single year to comply with this law. So they could tax you, of course. And – I mean – I think it's very interesting that the only real example of the type of regulation that we're dealing with with Obamacare comes from a regime that the framers of our Constitution thought the very model of a despotism.

In terms of the arguments that we're likely to see, the one – I won't get too much into the details, because I know you want to obviously get to the question and answer period. I will say, with respect to the leading Commerce Clause case that everyone refers to as supporting the law – that is *Gonzalez v. Raich*, the most recent of those cases. And in their case, the court upheld regulation under the Controlled Substances Act of homegrown marijuana. California had passed a law that allowed people to grow a certain amount for medical uses. And the argument was made that well, this is all local, and California has approved it, so it's lawful, and therefore, it is beyond the commerce power. The court rejected that and said, well, the fact is, as in the previous case about wheat in the 1940s *Wickard v. Filburn*, that the impact of those local – the local use of marijuana was sufficient. But I think the important thing to realize about that case is that in that case, Congress was regulating a thing, a product. It was regulating a substance. It wasn't regulating people.

If you avoid all of the substances, the Controlled Substances Act really has nothing to say to you. However, if you interact with one of those controlled substances, it has a great deal to say to you. I – my father, a few years ago, during his final illness, we were given a small bottle of liquid morphine. You have never seen so many frightening warnings with actual citations to federal statutes on that bottle. What you can do with it. When you picked that bottle up, you were subject to all of that and there are very serious criminal penalties would not apply. But when you put the bottle back down and walk away, you're no longer subject to it. I mean it has nothing to say to you until you interact with one of the substances.

That is not what Obamacare does. Obamacare applies to you regardless. You cannot escape it unless you flee the jurisdiction, unless you'd leave the country. And that – that is the quintessential exercise of a police power.

I think Bill is absolutely right to raise the Medicaid issue. As he suggested, the courts below ruled against us on that. I think if you read the opinions, what they were saying is this is just above our pay grade. They acknowledged the Supreme Court precedent in this area. They said, however, that there is no case in which the court exactly struck down a federal law on this basis, and therefore, we will not –

(Part three.)

MR. CASEY: There was a lot of debate. There was a lot of wonder of whether the Supreme Court would take the issue. It did take the issue, which means it has called the question on whether the rule it suggested in *South Dakota vs. Dole*, which is there

could be some restriction on federal money that is so coercive that it would violate the constitution.

They have now called the question on that and I think they will decide it. And I think, frankly, they will either have to abandon that doctrine or they will have to rule that this violates it because there is no other imaginable case that could be more clearly coercive.

And, indeed, it's interesting. If you talk to state officials, as Bill was, but especially in the health care area that will actually have to administer these programs in private about these issues, there is fear in their eyes. This will involve humongous costs that they know they can't meet and no one believes that the federal government will continue over the long term to fund this. As a result, this is a critical issue for them.

They cannot withdraw from Medicaid. Indeed, there is actually no provision in the law permitting it. I mean, we all assume that, well, there must be some way that a state can withdraw. Frankly, if you look at the statutes, there's no mechanism for that. Presumably, they'd make up as they go along if some state were to try to exercise but the fact is Congress never imagined that they would.

And the way we know that in a crystal clear fashion is that if a state withdraws from Medicaid, then the poorest people in that state have no means of complying with the mandate. Congress provided a means for not the poorest but a certain tranche of people who are above the poverty line but still not affluent. They expanded Medicaid to cover those people so that they would be able to comply with the mandate. And if they don't, if the states do not do that, then there's a federal alternative that will still cover them. There's no alternative for people below the poverty line. Basically, we either have to accept that Congress didn't care about that and that it really didn't care about universal coverage or that never imagined any of the states could withdraw. This law is mandatory and it is extremely coercive.

Very briefly with respect to the Anti-Injunction Act, as Bill mentioned – that I think – I do not think that is going to be the – the court's going to take very much time in getting passed it. It doesn't apply to the states. There was a case – South Carolina against Regan that establishes that.

And it's not a tax. The individual mandate has no – it is not based on Congress' tax authority, it doesn't raise revenue, it's not in the language that a tax is ordinarily passed in. It's a mandate. And it's enforced by a penalty. The only tax aspect of this law or this provision of the law is that it is housed in the internal revenue probe and that because of the way it will be enforced is that the IRS will keep your income tax refund if you don't comply. That's how they will collect it. Otherwise, there is no aspect of the mandate that is in any sense a tax.

Let me actually stop there and we can get to the questions.

MR. FITTON: Thank you. (Applause.) You know, if I could make a quick point – Judicial Watch cares about corruption. I think some of the intersections here are worth discussing or highlighting.

One is the issue of severability. You know, if this legislation had been treated in the normal course of things, the House and the Senate would have figured this out, but they had to get it passed, the way they needed to get it passed, they knew or should have known the severability issue would have popped up, meaning if the individual mandate was thrown out, would the whole kit and caboodle go out with it.

An effective – I'm sure you have something to say about this, Bill. There are enough people in Congress with enough experience to know how to pass legislation that would survive a severability challenge. And the fact that it didn't is not an indication that the law was badly written, that to was just that it was – the process was screwed up in getting it passed.

MR. MCCOLLUM: Well, certainly they had an enormous task in writing this and they were passing it with the 60 votes they had to find over in the Senate and they had devious ways of doing it. And it was a mess. I wasn't here for that, but I've heard stories about it. And I'm sure they omitted the severability clause, may have been by accident. I doubt it was intentional.

But, on the other hand, the fact is they did not put it in there. And that gives us a big opening and it gives us the chance to make the argument, which is sensible, the argument being that why would they have passed this without the individual mandate? How are they going to pay for it? They could have passed a tax, a regular tax. They could have said, okay, we're going to increase the income taxes and pay for this or they could have done what some conservative groups have argued since but has not yet been promoted in legislation and that's a refundable tax credit which would be another way, again, for the federal government to subsidize, but it wouldn't be mandating something under the Commerce Clause. It wouldn't be violating what Lee has just talked about and going into an area that is beyond the enumerated powers in our view in the constitution going – stretching the Commerce Clause to a ridiculous extreme and taking you into the requirement to buy a product or a service for the first time.

So I think they messed up, but I'm not sure they knew all of this, that the briefings they got from the Congressional Budget Office and Congressional Research Service and everybody else told them everything where they weren't going into this without being aware there were potential constitutional issues here.

MR. FITTON: I don't ask this question to put anyone on the spot with regard to presidential politics, but it's a matter of public debate as to why it is a state like Massachusetts could require individuals to purchase health care but not the federal government. Lee, could you speak to what the constitutional differences might be or maybe Massachusetts isn't able to do that under the law?

MR. CASEY: I think it is because it is a state and it has a police power. Requiring you to get health insurance or car insurance or even life insurance is certainly – at least I think, within the state’s general health and welfare powers. But it’s only the states that have that. And, obviously, Massachusetts did adopt such a provision. Some of the other states may have considered it.

But there is no problem – there’s certain no legal or constitutional problem with them doing that. And I think that really highlights the fundamental issue at stake here, which is are we going to dissolve or eliminate the bright line between what kind of powers the federal government can exercise and what kind of what kind of powers the state can exercise.

MR. FITTON: Betsy, the constitutional concerns aside, the practical concerns I think deserve a lot more attention here in Washington and the transformation of our health care system that’s taking place as we speak. Could you address that a little bit? I know you work closely with the health care industry and have a lot of expertise there about what’s happening now in response to Obamacare that Americans ought to be concerned about?

MS. MCCAUGHEY: Well, let me focus on one issue regarding that question that I think everyone in the room will care a lot about and that is the rapid diminution and the ability of doctors to make the best decisions for their patients unencumbered by federal interference.

And that’s why when I made my brief remarks at the beginning, I focused on Section 1311 of this law because you’re not simply required to be enrolled in what’s called a qualified plan, a plan that meets the requirement for essential benefits as defined by the federal government, by members of the executive branch, but once you’re in that qualified plan, this law gives the federal government a lot of authority over your health care, even though you’re playing for the plan yourself.

And beginning with the stimulus law, which you mentioned earlier, the architecture for real controls over how doctors treat privately insured patients are being put into place. The stimulus law provided very large payments to doctors and hospitals to bring onboard the kind of electronic health information technology needed to create a system of electronic medical records.

And even leaving aside the privacy issues for a moment, the rationale articulated by members of the administration – David Blumenthal, Ezekiel Emanuel, the doctors who were advising the president, was that we really can’t rely on doctors to do the best for their patients. There have to be federal guidelines to direct how doctors treat patients with an eye toward reducing the amount of care used.

And we should all be concerned about that because, as you mentioned earlier, of course it’s very important that we’re going to court to protect the bright line between

state and federal authority and to protect individual rights from an overreaching federal government.

But in addition, we're trying to protect the best health care system in the world. We all want everyone to get enough health care and to have access to health insurance, but just look at the data. If you're a seriously ill person, the best place to be is in the United States. A woman with breast cancer here in the U.S. has an over 90 percent chance of surviving it. In Europe, her chances are less than 80 percent. If you do the arithmetic, that means she's twice as likely to die from that diagnosis. Or, if you take prostate cancer, a man diagnosed with prostate cancer here in the U.S. has a 99 percent chance of surviving it. It's not a death sentence here, but in Europe, nearly one out of every four men who gets prostate cancer dies from it.

So we really have to make sure that the elements of this law that not only require you to be in an insurance plan but in an insurance plan that's highly regulated by the federal government where the regulations go beyond what the insurers do to what the hospitals and doctors being paid by those insurers do. That is really dangerous for the quality of your health care.

And, of course, as you mentioned, the health care industry it's already having a very detrimental effect on research because people are looking ahead to see what kinds of diagnostic tests and therapies will doctors in hospitals be free to use under Medicare, the largest payer to hospitals but also even under the commercial insurers.

And I would just leave you with one statistics. Since 1950, the United States has won more Nobel prizes in medicine and physiology than the entire rest of the world combined. If you have a serious illness that's considered incurable, this is the place to be. This is the place where there's hope, right?

So we want to make sure that whatever changes are made in our health care system to increase access and affordability do not do it at the expense of the quality of care and the independent ability of doctors and other caregivers to make clinical decisions for their patients without having their arms pulled back and tied by the federal government.

MR. MCCOLLUM: Can I piggy-back on that, Tom? I think Betsy has got exactly the right scope on this, but I want to point out what I think is the heart of the problem, the overriding heart. And that's the idea that the federal government centrally is going to be able to control all of the costs. And you have to realize that there's philosophical driving forces – there are philosophical driving forces here that want to go towards universal coverage, single-payer system, blah, blah, blah. Some of them are unwitting. Some of them are very witting.

But when you get the train moving, what puts all these interest groups and everybody else into the train with them on a lot of this is the idea we're going to say we've got to solve the problem of rising health care cost to who? Who's paying this?

The taxpayers. So if the government keeps getting bigger and bigger at the federal level, the pressure keeps getting greater and greater, because of budgetary reasons, to reduce the availability and access to certain care. I mean, how else can you put it?

Rationing done by the government for various reasons, the pressure in this bill to consolidate, to get doctors to go and go to work for hospitals, the idea of pressing hospitals and other health care providers to consolidate, to take as much – and all it's designed to save money, they say, but for whom? Save money for the federal government. And that's what's so bad about this. The federal government is, therefore, planning all of this in the name of doing good, but really the driving force is all about money.

And what gets lost in it too is what she's pointing out and that is the accessibility and the quality, because, if you see this system as I'm seeing it now, you are having fewer and fewer doctors for number of patients as the number of senior citizens and the baby boomers retire, as you see doctors retire, as you see problems that we have getting young people to go into specialties, as you see that there are not enough residencies.

We may need more – there are a lot of articles recently that I've read – I'm sure you have – that we aren't getting enough graduates, new graduates out of medical schools. Well, they're not anywhere near the number of residencies in the hospitals to be able to get these people trained right now. So we're already behind the curb. This makes it far worse.

So when you talk about accessibility, to what kind of health care? Are you going to have enough people who are nurses or physicians' assistants to make up all? There are people out there who believe that. Well, that's the way to go. And they can do some of it, but they can't do all of it and they can't make up for the doctor in every case.

So that causes quality to go down, causes accessibility to go down from what it presently exists. And when they talk about accessibility, I think they're talking, the other side, about insurance companies. And that's not true. Anybody can go get a doctor but it's the emergency room and the whole thing that the hospitals don't like about cost shifting, which is part the argument of the lawsuit.

But it's very big picture argument. People get lost in the weeds. They don't want to read all this stuff. It is complex in that regard. It is, Betsy. But when you have to read the 27 pages, you have to spend the time the three of us have looking at not just the law but the whole thing, the picture becomes pretty clear. And you just cry out inside you to somehow tell the world what this really is all about and that there are alternatives to this that provide for a preexisting condition to be covered or provide for more people to get better access, but this is not the way to do it. This is unrelated to the constitutional issue.

MR. FITTON: And, frankly, you don't need to read the whole thing. You just listen to what the attorney general is saying. And when you read newspaper articles

about agencies or medical boards suggesting that certain drug treatments are not cost effective – or don't work compared to effective research.

One drug decision they made at they were considering at the Medicare level – I forget which drug it was, John Alton (sp), if you remember, if you can hear me. Anyway, they're not supposed to consider cost. And it's an expensive treatment. But you see it pop up in the e-mail traffic. We uncovered the documents.

So it's clear that cost is a driving factor in these decisions that you're hearing, well, don't do this treatment. Don't get mammograms before a certain age, don't get this prostate cancer drug, don't get this breast cancer drug. The benefit is not worth the cost. And that's not a medical decision. That's a political decision.

MS. MCCAUGHEY: Right. I wanted to point out one quote from Kathleen Sebelius that embodies this very dangerous fallacy. Here she is, quote: "The only way to slow Medicare spending is to slow overall health care spending through comprehensive and carefully crafted legislation" – like this, right?

Now, of course there are other ways to slow Medicare spending. We could incept the eligibility age. We could ask some seniors who have the means to pay larger co-pays or pay a larger premium to share the cost. Instead, what the government has done is decide to lower the standard of care for all Americans.

And when you look at what this law does, the share of health care paid for by the federal government has actually increased from 45 percent to 50 percent over a short period of time, just a few years, by 2020. As Medicaid spending soars, Medicare spending, of course, is cut. There's a big shift of resources from the elderly to the poor in this law.

But they key here is that there are ways to make Medicare affordable without lowering the standard of care. And what those enormous cuts in Medicare payments to hospitals, to which I referred earlier, the ones that Richard Foster, who works for the president, has warned Congress will be deadly, those severe cuts in what hospitals are paid to care the elderly will impose an overall regimen of scarcity in hospitals.

It will mean fewer nurses on the floor, fewer pieces of diagnostic equipment so you wait longer when you need an X-ray or an MRI, fewer cleaners – I know that means more hospital infections.

And so, consequently, we have to tell the people in the federal government, yes, we're concerned about the cost of entitlements, but there are ways to fix them without silently and deceptively lowering the standard of care for all Americans, which is what you just described again with the emphasis on reducing preventive services and diagnostic tests.

MR. FITTON: Lee, if you could answer a constitutional – the new constitutional argument coming out of the Obama administration. I saw Dr. Ezekiel Emanuel, who's the White House health adviser and constitutional scholar now, talking about this morning the Necessary and Proper Clause. They're kind of avoiding the Commerce Clause and talking about this other area related to – this is part of the necessary and proper benefit.

MR. CASEY: Well, as I think it was Justice Scalia who wrote that the Necessary and Proper Clause is the last bastion of those defending unconstitutional laws.

The Necessary and Proper Clause is exactly what it says. It allows Congress to make any law necessary and proper to carry out one or more of its enumerated powers. It's not an independent grant of authority, which is to say it only applies if you start with a legitimate exercise of an enumerated power, which they actually don't have here, but even if they did, as in right, I mean, that really was one of the things, the issue in Raich, where they clear had Congress can clearly deny or exclude certain substances from interstate commerce, which is actually – if you back it down from to the theory, how is it that Congress can regulate either drugs or adulterated milk or many other things it's because they can exclude certain things from interstate commerce and from that the rest flows.

And what the court in Raich – and actually Justice Scalia in concurrence said was in addition under the Necessary and Proper Clause assuming that legitimate exercise of authority Congress can then also pass laws that will make it effective. And what they mean by that is not make it work. The Necessary and Proper Clause is not a catchall that basically lets Congress succeed in its goal, whatever that goal has to be.

What it means is Congress can do things like make you keep records. Congress can do things like create enforcement mechanisms. It can essentially avoid or keep people from either evading or avoiding or undercutting the law in its enforcement, but it is not a basis for saying that, well, if we need the right to impose the individual mandate and require people to do something in order to make the scheme that we've adopted work, then we can do that. That is not what the Necessary and Proper Clause says. It's not how it has been interpreted.

And even if you actually did accept that, it's not enough to be necessary. It's got to also be proper. Another thing that Justice Scalia pointed out in his Raich concurrence is that when you – that is a real test when you look at what is proper. You see what it does to the constitutional fabric. And here, what it does, is it allows the federal government to exercise the police power and ultimately destroys – when you put that in conjunction with the Supremacy Clause, it reduces the states to administrative units. And that is not what the constitution says.

MR. FITTON: Just quickly to status – do you think the court's decision, if it eliminates, if it takes out the individual mandate, would the decision result in the status

quo before the individual mandate was passed or do you see an opportunity for a more limited construction of how the Commerce Clause is used by Congress on other issues?

MR. CASEY: Well, that honestly is hard to say. I think in this instance they went over what I think is a very bright line and I think the court will push them back over it. Now, whether – and certainly as a result, hopefully, Congress will be a little more careful in the future. Okay. Probably not, but we can always hope.

Whether it leads to a new understanding of the Commerce Clause or additional restrictions, I'm not sure we can really say except to say that every time the court affirms that the federal government is one of limited and enumerated powers, it is good for Commerce Clause jurisprudence.

MR. FITTON: Well, I'll tell you what – go ahead, Betsy.

MS. MCCAUGHEY: I want to ask that question for just a second because in the 11th Circuit Court of Appeals' decision, Judges Hull and Dubina, who wrote the majority decision, it was two to one, explained that by requiring all Americans to be covered, all Americans under age 65 and there are few other exceptions to be covered by one of these plans, they used the word "over inclusive." And they took great pains to explain maybe it would be permissible to require those people seeking health care to pay for it with coverage. That they said might be plausible. And that was a very interesting comment to me.

But, of course, there's a difference, they said, between requiring those who are in the health care marketplace to pay for their health care with insurance and forcing people into commerce who are uninvolved. That, obviously, exceeds the Congress' authority. So it was interesting that they made that comment. And I can imagine Congress trying again to somehow require that people who go to the hospital have coverage. That would be different.

MR. CASEY: It would certainly be different under the Commerce Clause.

MS. MCCAUGHEY: Yes.

MR. CASEY: Now, at that point, of course, we start talking about other constitutional provisions. And when you start getting into the area of –

(Part four.)

MR. CASEY: Limiting how people can actually access health care. You do start running into some of the court's privacy decisions indeed, as suggested. In the abortion area, the court has carved out virtually the only absolute right in the Constitution, more absolute certainly than the right to free speech and religion, at least as the Supreme Court has interpreted those privacy cases. But it's true. It can't just be for that. If you ever write a bodily autonomy, it's the whole thing. It's not just that particular aspect. And it

would be very interesting to see how the court would adjudicate such cases, both under its privacy cases and under – from my perspective – more legitimate substantive due process cases that do suggest that there are certain things the government can't do to you. It's not very well defined. But making it impossible for you to get needed medical care, that's going to have a really good argument if that's one of those things.

MS. MCCAUGHEY: Yes. I'm actually amazed that so many women's groups have supported this law, obviously without reading it, because I remember when Gloria Feldt from Planned Parenthood, in 2004, said – she was applauding a court decision regarding the efforts of the federal government to ban partial birth abortion. And she said, you know, this decision is so important because it makes it clear that doctors and patients, not politicians, will be interfering in our health care and accessing our medical records. And here they are, supporting this law which makes it so clear that the federal government will be doing both.

MR. FITTON: I can imagine a conservative politician creatively thinking of a way to affectively outlaw abortions as a result of the federal government's role in providing health care coverage through either state exchanges or elsewhere. It's – there're opportunities for those who support liberal progressive policies on these issues to really lose out in some of these health care debates if conservatives decide to exercise the powers that are given to them through Obamacare.

MR. MCCULLOM: That's very true. I don't know that – I can elaborate on that, but that's very true.

MS. MCCAUGHEY: Well, one of the most amazing is, in this recent discussion over contraception, contraception is not guaranteed as an essential benefit under 1302 of this law. The secretary of health and human services, a presidential appointee, is given the authority to decide what must be covered under health plans. And a future occupant of the White House could say no contraceptives. Why would anyone want their decisions about their insurance plan to be left to the whim of whoever's president at that time?

MR. MCCULLOM: Can I jump in here, Betsy. I know John Fun (sp) and others want to ask us questions. I've seen their hands going up out the top. But I do want to elaborate on this one point. It brings up the issue about the contraceptive. It's – under the question of the mandates of what's in an insurance policy – and you've talked about it a couple of times, but I want to be real explicit because I've come from the states perspective now. And there are, in Florida, I think still about 60 mandated coverages in any basic health insurance policy, which is one of the great problems in politics, is that in studies that I've been involved with and I chaired and so forth and real health care reform, what do we need to do, what are the problems, one of the top problems is the fact that you could reduce the cost of insurance policies considerably if you didn't have all these interest groups lobbying the legislature and getting everything put into a policy, and then having so-called insurance companies – they aren't so-called – they are health insurance companies – wanting to keep them there for reasons that, say, why do I need to

have a certain maternity coverage if I'm a single male. Why does that need to be in the policy, or whatever else it may be.

So I always thought that it would be better for the states to be realistic about this and say, okay, there're 10, 12 things that ought to be in a basic policy and everything else is like television, you know, cable or whatever. You're going to go buy and you get a menu and you can pick and choose other alternatives to be able to – (inaudible) – the premium for it, but only a limited number of things in a basic policy. Now, the federal government's come along for the first time. And when I was in Congress, they didn't have any of these powers. They maybe have them, but – (laughter) – but for the first time they've come along and they said, we're going to regulate insurance. We're going to decide what's in a basic policy, but they didn't preempt the states. They states can still have those. So what's going to happen and what's happened with the contraception is – to me, the argument is not just about abortion or your views on life and choice and all, it's about this usurpation, this deal that's going on and it affects this case. It is not being argued. I don't think it's in the briefing, but I would have loved to put it in there if I'd had it in my mind or I could have convinced Paul Clement earlier or whatever. I did talked to him about it, but it's not in there.

In any event, the truth is that I discovered from our Department of Insurance in Florida one day and preparing for one of these talks and asking them some unrelated question, they had just sent a memo over at the state legislature and said, hey, there's a huge hidden cost in the Affordable Care Act to the states, because there's a provision in there that says that if the federal government has issued, say, 15 or 20 mandated provisions – let's assume for the sake of argument they're all identical to ones Florida already has – well, let's say 20, just to be simple. And Florida has 60 and I don't know the exact numbers. Let's just use them illustrations. Then, the state of Florida, unless it repeals those additional 40 mandates is going to have to pay money into the federal government to compensate for the additional Medicaid cost that the federal government's going to have as a result of all of what's going on with these additional mandates.

MS. MCCAUGHEY: And the insurance exchanges.

MR. MCCULLOM: And the insurance exchanges, too. But this is just one illustration of how devious this is and how much more costly this can be to the states. Now, granted in this case, probably the reason the argument is not being made to the court is pretty clear. If the states wanted to, they could repeal all those. But you know and I know they're not going to because of the politics. So this is going to become one – maybe they would repeal 10 of the additional 40 and you still have 30. I don't know what the number is, but it's still very expensive, just an enormous nightmare to the states. And it's because the federal government is choosing to usurp a power historically left to the states.

MR. FITTON: Well, let's allow the floor to participate here. I think we have a microphone. John Fun.

Q: This question's for Lee. I went to a panel discussion with your counterparts from the other side, discussing the Supreme Court issue. And they've obviously spent a lot of men and women hours in researching this. And they claim to have found their silver bullet, which is that in 1792, under President George Washington, there was some kind of mandate to the states that they empower a militia and that the militia be equipped with flintlock and various cartridges –

MR. CASEY: There you go, you just equip.

Q: The necessary and proper equipment to repel foreign invaders. In other words, it's a form of servitude that they were requiring. And I'm just wondering, have they found their silver bullet or is it lead?

MR. CASEY: I'm afraid, like the balls that were shot out of those muskets, it's lead. The – there are certain – there are, indeed, certain things that the federal government can require individuals to do. They are few and far between. The Militia Act is based on a specific grant of authority. I mean there is an enumerated power that allows Congress to raise and support armies and to regulate the militias. And that specific grant indeed supports that kind of regulation. It wasn't the Commerce Clause. And I mean I think that is the key. They're mixing and matching powers and they can't do that.

I should also say, they also raise often other examples, for example, the federal government can require you to serve on a jury, as can the states. And it's true. There's no – there is no specific provision in the Constitution that permits them to do that. But that is one of those few things where the Constitution does permit them to create courts. And from the perspective of the framers of the Constitution, when they said court, they didn't just mean a building. I mean they meant all of the attributes of a court that they were familiar with, jury service was one of them, and indeed so was militia service actually. That these things go, as they use to say, time out of mind. There are – were obligations of citizenship that are easily inferred in the Constitution and indeed certainly the military service. When the court, 100 year or so ago, upheld the draft for the first time, it very specifically said, look, Congress can raise armies. What do you think that meant? I mean, of course, they can impose a draft. That has been the case for the last 800 years.

And so I think when you start trying to come up with these other examples, find me an example under the Commerce Clause, which is what is at issue here.

MR. FITTON: I'm looking forward to a presidential candidate running on a platform requiring citizens to have – (inaudible) – would be a great one. (Laughter.) Any questions, comments.

(Part five.)

Q: – on Uwe Reinhardt's work on 18 percent of spending.

MS. MCCAUGHEY: I think he's referring to what – the work of a Princeton professor, Uwe Reinhardt, who argues that 19 percent of the difference between what Europeans spend on health care and Americans spend on health care is related to higher income levels in the United States.

MR. FITTON: Yes, any other questions, yes. Wait for the microphone.

Q: I haven't read the act. I'm sorry to say. I'm sorry to say, I haven't had time to read the act.

MS. MCCAUGHEY: Well, there's a rainy weekend, I'll give – (laughter) –

Q: So since I have an expert here – (laughter) – is this regulation of our health care only tied to the payment of it? For example, if I choose to go to a doctor and not invoke my state mandated insurance coverage, but just tell the doctor, I'll pay you cash for treating me. You won't have to go through any of the insurances or Medicare or Medicaid or anything else. Is that prohibited in any way in this act?

MS. MCCAUGHEY: No, I haven't found any prohibition of that nature. Be aware, though, that – it's a different circumstance when you're on Medicare. But below – for people who are under age 65, I haven't found any restrictions. Have you?

MR. MCCULLOM: No, but I want to tell you a little story. When I was in Congress, many years ago, not too senior, very junior, I had – I was a runner. I still run. I ran three and a half miles last night. So I'm real proud to continue to do that. And I had pulled something in my lower leg, near the ankle and the calf. And I went to see my orthopedic surgeon friend and he said, you either have a partial tear, Bill, of your Achilles' tendon or you torn your muscle. I don't know which. And if you – but I can't take a risk. If you are going to do all right with this, I don't – you can't run maybe for six months or maybe a year till we see if this is going to be a problem because I don't know if this is going to – (inaudible). But there is a new procedure – at that time a new procedure – not covered by my insurance. I'll call it MRI. And we could have that test done if you're willing to pay for it. It cost me over \$1,000 and I did have to pay for it. And I – and he looked at it and he said, wow, this is a little tiny severed muscle – it was kind of fun to look at it. It was about this small, the size of a pencil lead, but it's severed. Go back and go running. Wait a week maybe and go back and go running.

I'm in the airport in Colorado, about a month later. And it was bad weather, Betsy, and I was waiting on the plane and just coincidentally, next to me and struck up a conversation was the executive director of the Canadian Medical Society. And this was my only medical story. So I told him the story and he said, Congressman, under Canadian health care law, you could never have had that MRI. You could have never paid for it because it wasn't medically necessary and we wouldn't permit it, no matter what. And that's what a lot of us fear. That was – this struck me at the very beginning, illustration, a young guy in government of how I never wanted to go there, and yet, that's

really the inevitable path, I hear a lot of people talking about, who are behind this Affordable Care Act. That the philosophical drive, some of the political drive is to get to that Canadian, that European, that universal system, and ultimately, that's the rationing we're talking about.

It may be elderly. It may be whatever. But whatever somebody decides isn't necessary, you're not going to get, even if you want to. And now, that's not in the law. That's not in the Affordable Care Act. But this is sort of viewed by me and a lot of other people as just the first step. They were really excited about getting there. It may take them another 20 years. It might not be affecting you, but what about your grandkids?

MS. MCCAUGHEY: And in fact, one of the philosophical drivers, as you mentioned, behind this law, which has been articulated by several of the presidential – presidents' medical advisors is that America should be moving toward that European style of care, where government controls how much care people get, even if they are willing to pay for it themselves. Fortunately, a Canadian high court recently overturned that national law that prohibited people from paying for their care with American insurance or just out of pocket. But it is a driving force behind this law, not only that you shouldn't be able to pay for care yourself, but also that some people should not be able to get more care than others simply because they're willing to pay for it themselves.

MR. FITTON: We have time for one more question or comment. Yes.

Q: I'm Jim Mantle (sp) here. I'm just wondering what is the source of your confidence that you'll prevail. I mean, you know, obviously there's the merits of the argument, but as we all know, a lot of times, it really depends on the composition of the court. So could you address that?

MR. MCCULLOM: Well, I think both – Betsy can, too, if she wishes, but Lee and I can address that. And I'm sure we have slightly different views. I'm not overly confident we're going to prevail. I want to believe it's sort of like it's my basketball team. It's my case, so I'm a little biased. But I just have a hard time, as I told you at the beginning, I believe the Anti-Injunction Act argument will kick it off.

Number two, I think the individual mandate argument is really compelling to anybody who logically looks at it and you look at the court composition and you say, why would somebody go the other way. Now, I've listened to the experts – and Lee can go through this, because he's closer to some of them than I are, the people who are former solicitors generals, the ones who – someone on the other side of this, professor of law, and blah, blah, blah. And they will go along and they'll say a reason why Scalia, a reason why Roberts might vote the other way. But at the end of the day, I think there – we should get a five to four decision. We might even do better. We won one Democrat in the Eleventh Circuit, as you pointed out, Betsy, but Kennedy seems to be the swing judge. And I'm not going to get into that analysis. Lee can if he wants. But there – most of the target of all of this effort on both sides has been assuming Kennedy is key. And there's a lot of reason for us to believe that we are, based on his past decisions, on this

end on the Medicaid issue, very much appealing to what he's written in the past in his viewpoint. So I'm – I'm cautiously optimistic on severability. I think that we'll get some of it kicked out. I'd like to think we'll kick it all out. Based on past precedent, it probably is more difficult to predict that, whether there's any certainty that we'll get the whole thing kicked out.

And then on Medicaid, you know, no guarantees there. This is – but as Lee said, if they're ever going to do it, this is the time to do it, and we've got a great argument under the Dole case.

What do you think, Lee?

MR. CASEY: Yes, I agree. I mean I – obviously, you should never count your justices before they vote. (Laughter.) And I – I mean I followed a lot of the debate about well, which justice and will Justice Scalia, largely because of his concurrence in Raich, which I think the other side is misinterpreting, is he going to vote to uphold the law, and of course Justice Kennedy?

I think, frankly, if you look at the Supreme Court's precedent, if you look at the number of times that they have said that there is no general federal police power, if you look at their Commerce Clause cases, every single one of them discusses the type of activity that Congress is regulating. It's not Congress can regulate people. It's Congress can regulate this type of activity, sometimes even if it's non-commercial, but it's always – that is always there. The government has never yet come up with a decent theory about why – except trying to suggest that thinking is sufficient activity that – when I decide not to do something or have failed to do something, that too is activity. I mean that's a pretty thin – thin read. But with respect to Justice Kennedy, if you look at his decisions, and of course, he is – he has disappointed conservatives on a number of occasions, but one thing he genuinely believes, one thing he has written about since he got on to the court, and in many ways, it defines him as a judge, is the belief in federalism. He – I think he really believes what he writes, which is to say that the federal system is there for a reason. It is critical to the framers' vision of how we guarantee liberty and the courts are properly positioned to vindicate that in a proper case.

So I think that is really why I'm – I hope I'm not overly confident, but I think we will – we will prevail on the mandate, whether the court will strike down the whole law. They certainly ought to because I don't think there's a ghost of a chance Congress would have passed the other provisions without the mandate that they can operate, which is to say, yes, there're effective regulations of the insurance industry, but they don't achieve what Congress wanted to achieve. And so I think Judge Vinson, below, was absolutely correct in striking on the whole law. We'll see what the court does with that.

MR. FITTON: Well, certainly their appeal to Scalia would indicate that maybe that's an admission that they've lost Kennedy.

MR. CASEY: (Laughs.) Perhaps.

MR. FITTON: Who knows. Well, we'll know maybe next week, maybe not, depending on how the justices talk at the hearings, but we will know for certain, you believe, one way or another in June, unless they kick the can down the road under this Anti-Injunction Act argument.

MR. MCCULLOM: And by the way, Tom, as we dismiss here, I think the discussion this morning has pointed out a bottom line thing we all ought to take away from this. That is when this court decides, whatever it decides, no matter what it decides, it is the beginning, not the end of the debate over what happens in our health care system. It is not the end of this at all. It is a – it'll be a historic moment for us constitutionally and from a federalism standpoint and individual liberty standpoint, but it is not the end of the debate on health care.

MR. FITTON: Well, I appreciate it. You can see how we hit the gold mine with this panel with Betsy McCaughey, Bill McCullom, and Lee Casey. These three individuals have done more than virtually anyone else to really fend off two administrations on socialized medicine. So we appreciate their leadership on this. So thank you very much. (Applause.)

MS. MCCAUGHEY: Lee, good luck.

MR. FITTON: And thank you all for participating as well. Thank you.

(END)