OBAMA RECESS APPOINTMENTS SLAPPED DOWN BY DC CIRCUIT, CFPB AT RISK

What can only be described as a blockbuster opinion was just handed down by the DC Circuit in the case of Canning v NLRB, the validity of President Obama's recess appointments has been slapped down. Here is the full opinion. The three judge panel was Chief Judge David Sentelle, Karen Henderson and Thomas Griffith, all Republican appointees (one from each Bush and one Reagan).

The immediate effect of the court's decision is, of course, on the National Labor Relations Board (NLRB). Noel Canning was aggrieved by a decision of the NLRB and petitioned for review, the NLRB cross-petitioned to have its decision upheld. Fairly standard stuff – except the quorum on the NLRB Board was met only because of the fact Barack Obama controversially recess appointed three members in January 2012, as well as concurrently recess appointing Richard Cordray to be the Director of the Consumer Finance Protection Bureau. So, three out of the five members of the NLRB Board were, according to Canning's argument, not validly sitting and therefore their decision was invalid as to him

Canning had merits arguments on the specific facts of his individual case, but the court found those non-compelling and proceeded on the Constitutional arguments surrounding the validity of the recess appointments. And the Court agreed with Canning that Obama's recess

appointments were invalid. The discussion by the court can be gleaned from these passages:

> All this points to the inescapable conclusion that the Framers intended something specific by the term “the Recess,” and that it was something different than a generic break in proceedings.
> ….
> It is universally accepted that “Session” here refers to the usually two or sometimes three sessions per Congress. Therefore, “the Recess” should be taken to mean only times when the Senate is not in one of those sessions. Cf. Virginia v. Tennessee, 148 U.S. 503, 519 (1893) (interpreting terms “by reference to associated words”). Confirming this reciprocal meaning, the First Congress passed a compensation bill that provided the Senate’s engrossing clerk “two dollars per day during the session, with the like compensation to such clerk while he shall be necessarily employed in the recess.” Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71.
>
> Not only logic and language, but also constitutional history supports the interpretation advanced by Noel Canning, not that of the Board. When the Federalist Papers spoke of recess appointments, they referred to those commissions as expiring “at the end of the ensuing session.” The Federalist No. 67, at 408 (Clinton Rossiter ed., 2003). For there to be an “ensuing session,” it seems likely to the point of near certainty that recess appointments were being made at a time when the Senate was not in session – that is, when it was in “the Recess.” Thus, background documents to the Constitution, in addition to the language itself, suggest that “the Recess” refers to the period between

> sessions that would end with the ensuing session of the Senate.
> ….
> The Constitution's overall appointments structure provides additional confirmation of the intersession interpretation. The Framers emphasized that the recess appointment power served only as a stopgap for times when the Senate was unable to provide advice and consent. Hamilton wrote in Federalist No. 67 that advice and consent "declares the general mode of appointing officers of the United States," while the Recess Appointments Clause serves as "nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67, supra, at 408. The "general mode" of participation of the Senate through advice and consent served an important function: "It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." The Federalist No. 76, supra, at 456.

Then the blow was delivered:

> In short, the Constitution's appointments structure — the general method of advice and consent modified only by a limited recess appointments power when the Senate simply cannot provide advice and consent — makes clear that the Framers used "the Recess" to refer only to the recess between sessions.

and:

> In short, we hold that "the Recess" is limited to intersession recesses. The Board conceded at oral argument that the appointments at issue were not made during the intersession recess: the President made his three appointments to the Board on January 4, 2012, after Congress began a new session on January 3 and while that new session continued. 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012). Considering the text, history, and structure of the Constitution, these appointments were invalid from their inception. Because the Board lacked a quorum of three members when it issued its decision in this case on February 8, 2012, its decision must be vacated.

But the court did not stop there, although it well could have. Instead, Sentelle's opinion proceeds to also gut the foundation of Obama's recess appointments by determining the meaning of the word "happen" in the Recess Appointment Clause contained in Article II, Section 2, Clause 3 of the Constitution. That consideration is described by this discussion:

> Although our holding on the first constitutional argument of the petitioner is sufficient to compel a decision vacating the Board's order, as we suggested above, we also agree that the petitioner is correct in its understanding of the meaning of the word "happen" in the Recess Appointments Clause. The Clause permits only the filling up of "Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. Our decision on this issue depends on the meaning of the constitutional language "that may happen during the Recess." The company contends that "happen" means "arise" or "begin" or "come into being." The Board, on the other hand, contends that the President may fill up any vacancies that

> "happen to exist" during "the Recess." It is our firm conviction that the appointments did not occur during "the Recess." We proceed now to determine whether the appointments are also invalid as the vacancies did not "happen" during "the Recess."

As you might guess from the direction so far, the court determined that "Our understanding of the plain meaning of the Recess Appointments Clause as requiring that a qualifying vacancy must have come to pass or arisen "during the Recess"". Sentelle then, in pages 23-27 of the opinion, went through and crucified the four variations of their theme the Administration argued, including a battering ot the OLC opinion on recess appointments dated January 6, 2012 and hand crafted and signed by Virginia Seitz. Tough day for both Seitz and Obama.

The court also went on to say that maintaining the consistent with the Article I Legislative Branch prerogative of the "Power of the Purse":

> The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist "the overgrown prerogatives of the other branches of government." The Federalist No. 58, supra, at 357. The 1863 Act constitutes precisely that: resistance to executive aggrandizement.

While this was interpretive of the ability to pay recess appointments and what that portended to the Framer's intent, it is also a pretty clear shot at maintaining the inherent separation of power in the assignment of the Purse Power to Congress and not the executive, something lost recently on the Platinum Coin crowd.

So, the net result is that Canning's NLRB

decision against him is void. Further, it would appear that any other decision of the NLRB taken by the Board depending on the three Obama recess appointments is also void. That is a major problem because it leaves the NLRB with only one single validly appointed member at this point, and will affect literally hundreds of opinions rendered.

The effect of today's decision, however, most certainly is not limited to the NLRB. In fact, the effect on the NLRB may, in the long run, be the least damaging result. That is because, of course, on the same day Barack Obama made the three NLRB recess appointments, he also recess appointed Richard Cordray to lead the CFPB.

The reason I took up so many column inches laying out the nature and strength of the court's opinion is because it is the deepest judicial review of this issue ever, by far, is devastating in nature and, honestly, is pretty strong and compelling. And it without any question will be the same decision as will be applied to Richard Cordray's status the second a case and controversy hits it challenging Cordray's status. And one will.

The challenge to Cordray, however, is not nearly so clean an issue as the sudden facial validity of a finite number of NLRB opinions. The CFPB was a brand new agency, and one of the reasons getting a permanent director was so critical was that many of the powers and, particularly rule making powers, did not vest to the entity without one. But other powers had already transferred without Cordray being installed.

There is a CRS memorandum detailing much of the problem in scattered vesting of CFPB power:

> Not all of the CFPB's powers become effective at the same time. Some of the Bureau's authorities took effect when the Dodd-Frank Act was signed into law on July 21, 2010. However, most of the Bureau's authorities will go into effect on the "designated transfer date"—a date

> six to 18 months after enactment, as determined by the Secretary of the Treasury (Secretary). Currently, the designated transfer date is July 21, 2011.
>
> In addition to the effective dates set out in the CFP Act, the authority to exercise the Bureau's powers may be affected by the appointment of a CFPB Director. The Bureau is designed to be headed by a single Director, who is to be nominated by the President and subject to the advice and consent of the Senate. If a Director is appointed before the designated transfer date, he will be able to exercise all of the powers provided to the Bureau pursuant to the CFP Act. However, a Bureau Director has not yet been appointed. Until a CFPB Director is appointed, the CFP Act provides the Secretary the authority to exercise some, but not all of the Bureau's authorities. Although not beyond debate, the CFP Act appears to provide the Secretary the authority to exercise the Bureau's transferred powers, but not the authority to exercise the Bureau's newly established powers.

As I noted back at the time the recess appointments were made in January of 2012, the inconsistent, and sometimes incongruent, vesting of power in CFPB was a particular issue in relation to the debatable nature of Cordray's recess appointment.

In fairness, I thought the recess appointments would minimally stand up under the logic expressed by the 11th Circuit in *Evans v. Stephens*. Well, Sentelle and the DC Circuit took that argument apart with every bit the vigor it did Seitz's OLC Opinion argument. As I said then:

> Normally a confirmed appointee and a

> recess appointee have the same legal authority and powers but, to my knowledge, there is no other situation in which substantive power for an agency flows only through its specific "confirmed" director.

Well, today's decision in *Canning* is going to put all those questions into play when a CFPB case hits the DC Circuit. Oh, and one is on the way – *State National Bank Of Big Spring et al v. Geithner et al*, 12-cv-01032 (complaint here). This is a big truckload of trouble heading dead on for the Obama Administration.

Here is the next glaring trouble spot from today's *Canning* decision. Just yesterday, Obama formally nominated Richard Cordray for regular confirmation as head of the CFPB. It was a nice little ceremony carried on television and everything. And then Harry Reid, Carl Levin, Pat Leahy and the old school Senate Democrats went out and killed every possible ability for Obama to actually get Cordray through the Senate Republican filibuster gauntlet when they refused to meaningfully reform the filibuster (see: here and here).

Actions have consequences, and so do crustacean like inaction and fear as exhibited by the Old School Dems and the White House. You think the Senate No Men led by Mitch McConnell were obstructive of the CFPB and NLRB before? Just wait until now when they smell the agencies' blood in the water.

Surely the Obama Administration will correct all this with a request for en banc consideration by the DC Circuit or an appeal to the Supreme Court, right? Well, no and yes. The DC Circuit effectively does not do en banc considerations in the first place, and even if they wanted to (they won't) they may not even have enough active judges to pull it off (note that DC Circuit is down yet another active judge since that article was written).

So, there will be no en banc to pin hopes for. There will almost certainly, however, be an appeal to the Supreme Court. And there being at least an argument that there is now a circuit split between the DC Circuit's *Canning* decision and the 11th Circuit's *Evans* decision, there may even be a good chance that SCOTUS grants cert.

That is where the good news may end though. I expect the appeal to be on several issues and, as John Ellwood at Volokh Conspiracy notes, the Canning decision is MUCH broader than expected and, really, will preclude almost all recess appointment power as has been used in the last century.

It is possible that SCOTUS could craft a middle ground not so restrictive of the Presidential recess appointment power, but it is fairly easy to see them still disallowing Obama's January 2012 recess appointments of the NLRB members and Cordray. In fact, I would be shocked if they did otherwise at this point.

As Lyle Denniston at SCOTUSBlog notes:

> The main Circuit Court opinion was written by Chief Judge David B. Sentelle, and it was a strong affirmation of the "original meaning" mode of interpreting the Constitution – that is, analyzing a constitutional issue in terms of what the words of the document meant at the time they were first written. The Sentelle opinion was filled with recollections of early government history, and of what the earliest generations believed they had put into the presidential appointments clause of the document.

It was certainly that, and such framing is designed to play straight into the heart of the conservative bloc love of "original intent" in Constitutionalism. They may walk back *Canning* a little, but on the critical Obama appointments, it is hard to see them not affirming.

This is a very ugly and humbling day for the Obama Administration.

THE CONSTITUTIONAL ARGUMENT AGAINST THE PLATINUM COIN STUNT

They came for the 4th Amendment, but it was necessary for the war on drugs. They came for the 5th Amendment, but due process had to be sacrificed for the war on terror. They came for the 6th Amendment, but confrontation had to succumb to classification and secrecy. They came for the War Powers Act because Libya was "required to be protected". Now they are coming for one of the most fundamental of Constitutional checks and balances, the Congressional prerogative of the purse.

Who are "they"? They are, of course, the ubiquitous Article II Executive Branch. And they have a never ending thirst for usurping power, all in the name of efficacy. It is always necessary, it is always an emergency, there is always a reason, for them to take the power. They are the Daddy Branch, and it is always best to trust them. So they say.

Back when "they" were the Bush/Cheney regime, liberals, progressives, and Democrats in general, had a seriously dim view of

accumulation and usurpation of power in a unitary Executive. When Dick Cheney, David Addington and John Yoo contorted existing law, gave it application never intended, and manufactured legal and governmental gimmickry to accomplish stunningly naked Executive power grabs, those on the left, especially the blogosphere, screamed bloody murder. Well, that is precisely what is afoot here with the Mint the Coin! push.

Where is that principled set of voices on the left now? Things are different when it is your guy in office I guess. Because the active liberal/progressive left I see out there is currently screaming to "Mint the Coin!" doesn't seem to realize they are calling for the same type of sham rule of law that John Yoo engaged in.. This is most curious, because "Minting the Coin!" contemplates a naked power grab by the Executive Branch of historic proportions. It is a wholesale taking of the Congressional purse prerogative under the Constitution. But, hey, its an "emergency". Of course. It always is when the Article II Executive Branch comes to feed in the name of efficacy.

What is the value of Separation of Powers, and constriction of Constitutionally assigned powers to the branch to which they were assigned, and what is the value in insuring that an imperial Executive Branch does not usurp too many powers? Let James Madison, in Federalist No. 47 explain:

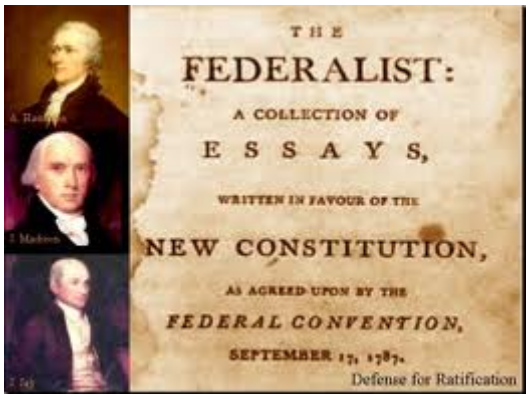
> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of

> power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.
> ….
> The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them. " This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department (Publius, Federalist 47).

What is the import of the Congressional "Power of the Purse"? As James Madison said in Federalist No. 58:

> This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any

> constitution can arm the immediate represen- tatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure (Publius, Federalist 58).



The mantra is always "oh it will be reined in later after the emergency is over" and/or "the courts will sort it out later and fix it". Not so in this case, the courts will not be settling this one; it is almost certainly the exact type of political issue historically and consistently refused to be entertained by federal courts under the Political Question Doctrine. Even if a federal court, presumably the District Court for the District of Columbia, would entertain the matter, do you really think the DC Circuit Court of Appeals, much less the Supreme Court led by Roberts and Scalia, would uphold this tomfoolery?

Also, as Hamilton noted in Federalist No. 78:

> The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.

The only other avenue of corrective legal relief is the impeachment process pursuant to Article I, Sections 2-3. It is highly doubtful the House would issue a charge of impeachment (although,

don’t kid yourself, this is exactly the type of situation the impeachment power was designed for); but even if the House did, the Senate would never convict. So, the upshot is that if Obama is insane enough to pull the coin stunt, it will wind up as a historic and destructive gutting of power from the Article I Congress by the usurping Article II Executive Branch. And it will stand because there was no truly available forum to litigate the merits on their own right. Is that a good precedent to set in the name of efficacy? No.

The temporary thrill that those on the left would receive from the stunt would leave indelible lasting harm on our root Constitutional government. And, yes, that still, even in this day and age, matters. But, what about Harvard Professor Lawrence Tribe having given his blessing to the “legality” of “Minting the Coin!”? There is, sadly for the coin aficionados, a difference between the legality of the physical “minting” of the trillion dollar platinum coin, and the legality and constitutionality of the plan to use it as a direct effective substitute for Congressionally authorized debt. Yes, it really is that simple.

Yesterday, I broached this subject with Professor Erwin Chemerinsky, and here is his response:

> The Constitution says that Congress has the power to borrow money. The President cannot do this by unilaterally raising the debt ceiling or issuing a trillion dollar coin. The debt ceiling is set by statute and I think that there is not a plausible argument that it is unconstitutional.
>
> I wish the President could do these things. I think increasing the debt ceiling here is essential and should not be an issue. But I do not think it can be done without Congress.

Yes. And that is the thing; even assuming arguendo the physical minting of the trillion dollar platinum coin is "legal" as suggested in this post by Markos (and for reasons left for another day, I maintain that is not nearly as clear as claimed), the contemplated *use of the coin* is not constitutional, and it is not appropriate. Therein lies the problem so many seem to suddenly, now that it is our man in the White House, conveniently ignore. Again, though, it is always convenient and exigent when the power hungry, usurping, unitary Executive theory comes calling, isn't it?

So, there is the Constitutional case, or at least a healthy part of it. But what of the more pragmatic considerations? Do they militate in favor of President Obama being so brash as to blow up the founding checks and balances, in the form of the Purse prerogative being designated to the Congress? No, they don't.

It is not every day I agree this much with something Ezra Klein said, but credit where due, I do today:

> But there's nothing benign about the platinum coin. It is a breakdown in the American system of governance, a symbol that we have become a banana republic. And perhaps we have. But the platinum coin is not the first cousin of cleanly raising the debt ceiling. It is the first cousin of defaulting on our debts. As with true default, it proves to the financial markets that we can no longer be trusted to manage our economic affairs predictably and rationally. It's evidence that American politics has

> transitioned from dysfunctional to broken and that all manner of once-ludicrous outcomes have muscled their way into the realm of possibility. As with default, it will mean our borrowing costs rise and financial markets gradually lose trust in our system, though perhaps not with the disruptive panic that default would bring.
> ….
> The argument against minting the platinum coin is simply this: It makes it harder to solve the actual problem facing our country. That problem is not the debt ceiling, per se, though it manifests itself most dangerously through the debt ceiling. It's a Republican Party that has grown extreme enough to persuade itself that stratagems like threatening default are reasonable. It's that our two-party political system breaks down when one of the two parties comes unmoored. Minting the coin doesn't so much solve that problem as surrender to it.

While Mr. Klein does not address the Constitutional considerations and related arguments against the coin, and perhaps takes too easily some of the arguments for "legality", his depiction of the political and practical wasteland that would result from Minting the Coin! are spot on. And it is, as with the Constitutional considerations, not a very pretty picture painted.

Back in July of 2011, the last time the debt ceiling crisis reared its ugly head, the call was to "Use the 14th" and have the president simply issue more debt without the consent of Congress. I wrote then why "Using the 14th" was not a viable option. It is still not a viable option now. We also learned after that 2011 iteration of the debt ceiling crisis was resolved, that the White House had received guidance from the Office of Legal Counsel in the

form of an OLC memo. Considering the strength of the Executive Branch's statements that it could not circumvent the Congress' control of the debt, it is almost certainly the case that the OLC guidance was that any such action was unconstitutional.

The premise, however, behind "Mint the Coin!" is no more constitutional that that of "Use the 14th". In fact they both, at root, rely on the same premise, namely the language in the first sentence of Section 4 of the 14th Amendment:

> The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.

But that sentence cannot be taken in isolation from the remainder of the Constitution, especially the primacy of the Article I Purse Power. No matter how much the gimmick crowd may wish it to be, it is not an ultimatum on the President to blow up the Constitutional system of checks and balances our government is based on. If one needed any further reminder of this fact, it is contained in Section 5 of the 14th Amendment, which states:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

So, not only does the 14th Amendment not provide the rationale for a gimmick solution to the debt ceiling crisis, if anything, it reinforces that it is Congress who controls the issue. Exactly as Professor Chemerinsky opined above.

I too join Professor Chemerinsky in wishing there was an easy path for President Obama to do these things and win the day. Such, however, is not how our Constitution is designed, nor does it so allow.

WAYNE LAPIERRE DEMANDS $5 BILLION SUBSIDY FOR HIS NGO

The central thrust of Wayne LaPierre's press conference offering "solutions" in the wake of the Newtown massacre is to put armed security in every school.

There were 98,706 public schools in 2008-9 (plus 33,740 private schools, which I'll leave aside).

Even assuming you underpay these armed security guards until such time as school unions represent them, you would pay at least $50,000 in wages and benefits for these armed guards.

That works out to roughly $5 billion, for just one guard in every public school.

That, at a time when we're defunding education.

In short, Wayne LaPierre just demanded a $5 billion subsidy for his NGO, the price he presumes we should pay as yet another externalized cost of America's sick relationship with guns.

I've got a better idea. Let's tax gun owners, to cover thus potential cost and the cost of responding to the massacres the NRA enables. Anything short of such stiff taxes would be socialism.

HOW OBAMA'S DOJ

SOLD OUT AMERICAN CITIZENS IN THE ROBO-SIGNING CRIMINAL PLEA

Yesterday afternoon there was a critical guilty plea entered in the ongoing robo-signing mess that lies beneath the festering mortgage crisis.

> The former executive of a company that provided documentation used by banks in the foreclosure process pleaded guilty to participating in a six-year mortgage-forgery scheme.
>
> The deal announced Tuesday by the Department of Justice represents one of the only successful criminal prosecutions resulting from the “robo-signing” scandal that surfaced two years ago.
>
> Lorraine Brown, 56 years old, of Alpharetta, Ga., who is a former executive of Lender Processing Services Inc., LPS of Jacksonville, Fla., pleaded guilty to a scheme to prepare and file more than one million fraudulently signed and notarized mortgage-related documents.

A criminal guilty plea to straight on systemic fraud like this (here are the pleas documents) ought to have far ranging consequences for home and mortgage holders, not to mention local county recorders, whose quiet title and fee income, respectively, were damaged by the fraud, or at least so you would think.

A long time attorney involved in the field of mortgage fraud, Cynthia Kouril, writing at Firedoglake, laid out well the paths to recourse plaintiffs damaged by this fraud should have:

> At the end, I said that this could be a game changer. In the comments, folks thought that was a reference to the fact that for once we have a criminal case which involves a top tier executive. That is a big deal no doubt, but not the reason this could possibly change everything.
>
> Homeowners who are being foreclosed upon based on a document chain that includes documents prepared by DocX/LPS have a built-in defense, and actually a counterclaim against Ms. Brown's company. The defense is that the bank offering these documents as evidence no longer has any right to rely on them as proof of anything, and any bank offering a DocX or LPS document as evidence after yesterday knows or should know that they are committing a fraud on the court and on the homeowner.
>
> Secondly, it would mean that the bank would be unable in many instances to prove an essential factual element of its case, that the mortgage and/or note was transferred to the foreclosing entity, and the matter would be ripe for a Summary Judgment motion by the defendant homeowner. This ONLY applies if there are DocX or LPS documents in you chain of transfer (just like the various MERS defenses only applied if your mortgage was put into the MERS system). Also, there may be other facts or circumstance in individual cases that would moot this point.

That sounds marvelous for so many homeowners and other victims, but it is not necessarily going to be the case. Why? Because the Obama

Administration and their Department of Justice intentionally sabotaged the ability of these victims to use this plea against the co-conspirator banks, mortgage brokers and mortgage servicers. David Dayen of Firedoglake News is one of the only ones who have caught on to this whitewashing by the DOJ:

> Sadly, the federal plea deal strains to hold servicers harmless for this conduct. See this key section, from the "Factual Basis" of the plea:
>
> > Brown represented to clients that DocX had robust quality control procedures in place to ensure a thorough and proper signing, notarization, and recordation process. As a result of these representations, clients hired DocX […]
> >
> > Unbeknownst to DocX's clients, the Authorized Signers were instructed by Brown and other DocX employees to allow other, unauthorized, DocX employees to sign, and to have the document notarized as if the actual Authorized Singer had executed the document.
>
> This is just bunk. The idea that servicers – arms of the biggest banks in America – were just duped by Lorraine Brown's claim of "robust quality control procedures" makes no sense whatsoever. They may not have known the mechanics of Brown's document fraud, but that's just because they wanted to insert a layer of plausible deniability – in fact for circumstances just like this. But they definitely wanted documents they could use in court to foreclose on borrowers as quickly as possible. And they didn't exactly have the ability to do that though any other method than fraud.

That is exactly right. The plea allocution expressly covers the banks asses about knowledge of the forgery. So, as it stands now banks and servicers are also “victims” of Lorraine Brown’s fraud. And that is nothing but pure, unadulterated bullshit, specifically manufactured in the plea process by the government to shield the financial industry at the expense of decimated citizen homeowners.

The pleas did NOT need to include that gratuitous financial industry exculpation, it was sheer treachery by the Obama Department of Justice on the citizens they are supposed to be representing. The subject language did absolutely nothing to mitigate, aggravate, nor perform any function whatsoever, as to the parties to the plea, i.e. the government and the defendant, Lorraine Brown. It’s sole function was ass covering and water carrying for the bankers and financial industry.

SANDY’S TEACHABLE MOMENT ON INFRASTRUCTURE

In a remarkable development, the devastation from Sandy now is finally moving a least a portion of the national conversation onto the very important topic of infrastructure and how we need to renew our degrading infrastructure in addition to hardening it against new waves of damage due to weather extremes brought on by climate change. Consider this bit of truth-telling from Connecticut Governor Dannel Malloy on Rachel Maddow’s show last night:

But it’s not just Malloy who sees the need to have the future in mind during the recovery from Sandy. Today’s New York Times carries an article in which New York Governor Andrew Cuomo

discusses how preventive steps need to be taken in the near future:

> On Tuesday, as New Yorkers woke up to submerged neighborhoods and water-soaked electrical equipment, officials took their first tentative steps toward considering major infrastructure changes that could protect the city's fragile shores and eight million residents from repeated disastrous damage.
>
> Gov. Andrew M. Cuomo said the state should consider a levee system or storm surge barriers and face up to the inadequacy of the existing protections.
>
> "The construction of this city did not anticipate these kinds of situations. We are only a few feet above sea level," Mr. Cuomo said during a radio interview. "As soon as you breach the sides of Manhattan, you now have a whole infrastructure under the city that fills — the subway system, the foundations for buildings," and the World Trade Center site.
>
> The Cuomo administration plans talks with city and federal officials about how to proceed. The task could be daunting, given fiscal realities: storm surge barriers, the huge sea gates that some scientists say would be the best protection against floods, could cost as much as $10 billion.

It is sad that such a level of devastation is needed before there is talk of action. As recently as last month, the Times carried yet another warning that exactly this type of damage was becoming increasingly likely:

> But even as city officials earn high marks for environmental awareness, critics say New York is moving too slowly to address the potential for flooding that could paralyze

> transportation, cripple the low-lying financial district and temporarily drive hundreds of thousands of people from their homes.
>
> Only a year ago, they point out, the city shut down the subway system and ordered the evacuation of 370,000 people as Hurricane Irene barreled up the Atlantic coast. Ultimately, the hurricane weakened to a tropical storm and spared the city, but it exposed how New York is years away from — and billions of dollars short of — armoring itself.
>
> "They lack a sense of urgency about this," said Douglas Hill, an engineer with the Storm Surge Research Group at Stony Brook University, on Long Island.
>
> Instead of "planning to be flooded," as he put it, city, state and federal agencies should be investing in protection like sea gates that could close during a storm and block a surge from Long Island Sound and the Atlantic Ocean into the East River and New York Harbor.

And it was exactly that storm "surge from Long Island Sound and the Atlantic Ocean into the East River and New York Harbor" that flooded lower Manhattan and the New York subway system. Considering that estimates yesterday on the financial impact of Sandy were already going as high as $25 billion (and I expect that number to go up by a lot as more damage is discovered), an investment of $10 billion for a surge barrier, coupled with a massive push for revitalizing and hardening the electrical and transportation systems behind the barrier, looks like a very wise investment. Sadly, though, as Malloy points out, half the country doesn't believe in infrastructure investment. At least, that was the case before Sandy. Will infrastructure scrooges who were directly impacted by the storm

finally see the importance of being proactive, or will yet another teachable moment be lost?

PROVIDE FOR THE COMMON DEFENSE OR GO GALT?

We awake to a changed and battered country this morning. CNN's headline at CNN.com currently blares "Millions wake to devastation", while AP gives us a state-by-state rundown of the effects of Hurricane (and then Superstorm) Sandy. At a time, though, when the natural American response is to help one another, we have perhaps the strongest example of what is at stake next Tuesday as we go to the polls for a Presidential election. Here is Mitt Romney in the Republican debate hosted by CNN:

[youtube]http://www.youtube.com/watch?v=RTSHxR_4rc8[/youtube]

The idea that an "immoral" FEMA should be disbanded in favor of private sector disaster response did not go over well with the editorial staff of the New York Times. From this morning's editorial:

> Over the last two years, Congressional Republicans have forced a 43 percent reduction in the primary FEMA grants that pay for disaster preparedness. Representatives Paul Ryan, Eric Cantor and other House Republicans have repeatedly tried to refuse FEMA's budget requests when disasters are more expensive than predicted, or have demanded that other valuable programs be cut to pay for them. The Ryan budget, which Mr. Romney praised as "an excellent piece of work," would result in severe cutbacks to the agency, as

> would the Republican-instigated sequester, which would cut disaster relief by 8.2 percent on top of earlier reductions.
>
> Does Mr. Romney really believe that financially strapped states would do a better job than a properly functioning federal agency? Who would make decisions about where to send federal aid? Or perhaps there would be no federal aid, and every state would bear the burden of billions of dollars in damages. After Mr. Romney's 2011 remarks recirculated on Monday, his nervous campaign announced that he does not want to abolish FEMA, though he still believes states should be in charge of emergency management. Those in Hurricane Sandy's path are fortunate that, for now, that ideology has not replaced sound policy.

A common refrain for the Galt crew is that they want to go back to the basics of the Constitution. And yet, here is the Preamble:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The simple truth is that if we wish to provide for the common defense and promote the general welfare in the face of such a huge storm, then a Federal agency coordinating the preparations before the storm and the response afterwards is the most efficient plan. Putting disaster capitalists in charge instead would only lead to many more deaths and huge delays in response times.

As the country responds to this terrible blow from the storm, it is worth considering whether we wish to go back to the ineptitude of the Katrina response (or worse) or if we want to work together for the common defense through a properly funded FEMA.

JOHN BRENNAN VOWS TO COMBAT THE "BAD GUYS" ATTACKING OUR CRITICAL INFRASTRUCTURE

John Brennan just gave a speech, purportedly about our policy in Yemen. But it ended up being largely about infrastructure, That's partly because his speech focused on how, rather than spending 75% of our Yemen funds on bombs, we're now spending just 50% (having bumped up the total to include an equal amount development assistance). So a good part of his talk focused on whether or not Yemen would be able to do the critical work of rebuilding its infrastructure sufficient to combat AQAP which, in some areas, has done a better job of building infrastructure.

Of course as I noted while he spoke, a number of the infrastructure challenges Brennan confidently assured we could help rebuild—things like access to water—are challenges we are increasingly failing in our own country.

And then, because the DC attention span had had enough of Yemen, moderator Margaret Warner asked Brennan what the Administration will do now that their cybersecurity bills have been defeated. To justify his talk of using Executive Orders to address some of the infrastructure problems,

Brennan talked about the “bad guys” who posed a cyberthreat to our critical infrastructure.

Nowhere did Brennan acknowledge the much more immediate threat to our critical infrastructure: in the corporations and politics that let it decline. PG&E and Enbridge, failing to invest the money to fix known defects in their pipelines. Fracking companies, depleting and degrading our water supply. Verizon, eliminating choice for Internet access for rural customers. Republicans who want to gut our Postal Service and passenger rail. And heck, even Fat Al Gore and climate change, which is not only depleting our water supply but stalling key water transport routes.

Brennan promises to help rebuild Yemen’s infrastructure. But not only can’t he implement his plan against the bogeyman “bad buys” threatening our infrastructure, he seems completely unaware that those “bad guys” aren’t anywhere near the biggest threat to our infrastructure.

Don’t get me wrong. I applaud the Administration’s decision to dedicate money to Yemen’s infrastructure, even if I think a 50/50 split, aid to bombs, is still woefully inadequate. But until we begin to see what “bad guys” pose the biggest threat to our own infrastructure, I’m skeptical our efforts in Yemen will be any more successful than they were in Iraq or Afghanistan.

THE SCOTUS HEALTHCARE DECISION COMETH

[**UPDATE**:Okay, from the SCOTUSBlog "The entire ACA is upheld, with exception that federal government's power to terminate states' Medicaid funds is narrowly read." Key language from the decision on the mandate:

> The money quote from the section on the mandate: Our precedent demonstrates that Congress had the power to impose the exaction in Section 5000A under the taxing power, and that Section 5000A need not be read to do more than impose a tax. This is sufficient to sustain it.

And, boy howdy, was I wrong. I steadfastly maintained that CJ Roberts would never be the swing vote on a 5-4 majority, but would only join a liberal majority on the heels of Tony Kennedy. WRONG! The mandate survives solely as a result of Roberts and without Kennedy. Wow.

Final update thought. While I think the mandate should have been constructed as a tax, it clearly was not in the bill passed. You want to talk about "legislating from the bench"? Well hard to see how this is not a remarkable example of just that. I am sure all the plebes will hypocritically cheer that, and fail to note what is going on. Also, if the thing is a "tax" how is it not precluded as unripe under the AIJA? don't have a fine enough reading of the opinion – read no reading yet – to discern that apparent inconsistency.

As to the Medicaid portion, here is the key opinion language on that:

> Nothing in our opinion precludes Congress from offering funds under the ACA to expand the availability of health care, and requiring that states accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.

Oh well, people on the left have been crying for this crappy law, now you got it. Enjoy. I will link the actual opinion as soon as it is available.

And here is THE FULL OPINION]

Well, the long awaited moment is here: Decision Day On The ACA. If you want to follow the live roll out of the Supreme Courts decisions, here is a link to the incredibly good SCOTUSBlog live coverage. Coverage starts at 9 am EST and the actual Court proceedings starting at 10 am EST.

This post will serve two functions. The first is to lay just a very brief marker, for better or worse (undoubtedly the latter I am afraid), going into decision day, hour and moment, and a ready location to post the decision of the court and link the actual opinions. The minute they are known and links available, they will be put here in an update at the top of the post. That way you can start the discussion ahead of the decisions, lay a record of your predictions ahead of time AND have a place to immediately discuss the rulings as they come in and immediately afterward.

Many friends and other pundits involved in the healthcare SCOTUS discussion have been working for weeks on alternative drafts of posts and articles to cover every contingency so they can immediately hit the net with their takes. That is great, and some of them will be a service. But I have just been too busy lately to expend that kind of energy on something so canned.

Sorry about that. So my actual analysis and thoughts will mostly have to come later, but they will be on the merits, such as they may be, when the actual decisions are in. Also, I will be in comments and on Twitter (under “bmaz” of course).

Okay, with the logistics out of the way, I have just a few comments to lodge on the front end of this gig. First off, the ACA/PPA started off as truly about health *insurance*, not about health *care* from the start, and that is, still, never more true than today. Marcy laid out why this is, and why a LOT of people may get, or be forced into, purchasing health insurance, but there is a real question as to whether they will be able to afford to actually use what they will be commanded to buy. See here, here and here as a primer. Those points are pretty much as valid today as they were back when she wrote them.

Secondly, I have no real actual idea how the ruling will come down as to the merits. But, just for sport and grins, I guess I should take a stab at what I think after all the briefing and oral arguments, so here goes. The Anti-Injunction Act argument that the issue is a tax matter and therefore cannot be ripe for consideration until implemented and applied, will be rejected. The individual mandate is struck by a very narrow majority in a very carefully worded opinion written by John Roberts. The remainder of the ACA is deemed severable and is left to stand, and the Medicaid provisions are left intact, again by a narrow majority. Here is the thing, I would not bet one red cent of my *own* money on the foregoing; but if I could play with *your* money, I guess that is how I would roll. Maybe. Note that, before oral argument, my prediction was that the mandate would be upheld; I may regret not sticking with that call.

The real $64,000 question is the mandate, and that could just as easily be upheld, in which case it will likely be by a 6-3 margin (I still think Roberts writes the opinion, and if that is

to uphold that means it will be 6-3). Here is what I will unequivocally say: however this goes down as to the mandate, it is a very legitimate issue; the arguments by the challengers, led by Randy Barnett, are now, and always were, far more cognizant than most everyone on the left believed or let on. I said that before oral argument, I said that after oral arguments and I say that now. Irrespective of what the actual decision turns out to be. Oh, and I always thought the hook liberals desperately cling to, *Wickard v. Filburn*, was a lousy decision to start with.

I have been literally stunned by the ridiculous hyperbole that has been blithely bandied about on the left on the ACA cases and potential striking of the mandate. Kevin Drum says it would be "ridiculous", James Fallows says it would be a "coup!", Liz Wydra says the entire legitimacy of SCOTUS is at issue, So do the Jonathans, Chait and Cohn. A normally very sane and brilliant guy, Professor David Dow, went off the deep end and says the justices should be impeached if they invalidate the mandate. The Huffington Post, and their supposed healthcare expert, Jeffrey Young, ran this insanely idiotic and insulting graphic. It is all some of the most stupefyingly hyperbolic and apoplectic rubbish I have ever seen in my life.

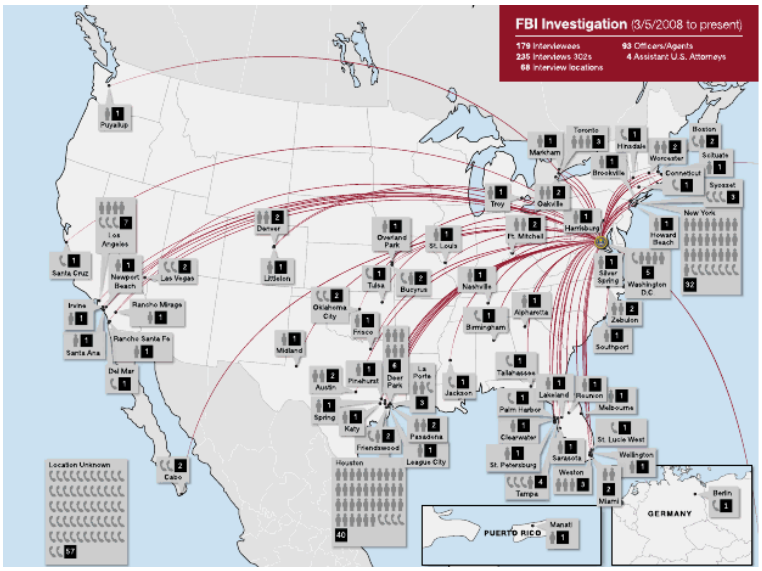
Curiously, the ones who are screaming about, and decrying,"politicization of the Court", my colleagues on the left, are the ones who are actually doing it with these antics. Just stop. Please. The mandate, and really much of the ACA was ill conceived and crafted from the get go. Even if the mandate is struck, the rest of the law can live on quite nicely. Whatever the decision of the court, it will be a legitimate decision on an extremely important and very novel extension of Commerce Clause power that had never been encountered before.

One last prediction: Irrespective of the outcome today, the hyperbole will continue. So, there is the warm up. Let's Get Ready To Rumble!

WHY THE DOJ CAN'T PROSECUTE BANKSTERS: MAP OF CLEMENS INVESTIGATION

At a time when there are still no significant prosecutions of major players, banks and investment shops responsible for the financial fraud that nearly toppled the world economy and is still choking the US economy, we get an explanation why from an unlikely source – the Roger Clemens trial in Judge Reggie Walton's courtroom in the DC District. During defense examination of FBI special agent John Longmire today, a map of the FBI/DOJ investigation of Roger Clemens, who was accused of lying about getting a few steroid shots in the late 90s and early 2000s, was displayed. We are now two full months into the second trial of Roger Clemens stemming from this investigation.

Any more questions on why DOJ cannot get around to prosecuting banksters??



REQUIEM FOR ACA AT SCOTUS & LEGITIMACY OF COURT AND CASE

The Patient Protection and Affordable Care Act (ACA), otherwise popularly known as “Obamacare ” had a bit of a rough go of it this week at the Supreme Court. Jeff Toobin called it a train wreck (later upgraded to plane wreck). Kevin Drum termed it a “debacle” and Adam Serwer a “Disaster“.

Was it really that bad? Considering how supremely confident, bordering on arrogant, the Obama Administration, and many of the ACA’s plethora of healthcare “specialists”, had been going into this week’s arguments, yes, it really was that bad. Monday’s argument on the applicability of the tax Anti-Injunction Act (AIJA) went smoothly, and as expected, with the justices appearing to scorn the argument and exhibit a preference to decide the main part of the case on the merits. But then came Tuesday and Wednesday.

Does that mean the ACA is sunk? Not necessarily; Dahlia Lithwick at Slate and Adam Bonin at Daily Kos sifted through the debris and found at least a couple of nuggets to latch onto for hope. But, I will be honest, after reading transcripts and listening to most all of the audio, there is no question but that the individual mandate, and quite possible the entire law, is in a seriously

precarious lurch.

Unlike most of my colleagues, I am not particularly surprised. Indeed, in my argument preview piece, I tried to convey how the challenger's arguments were far more cognizable than they were being given credit for. The simple fact is the Commerce Clause power claimed by Congress in enacting the individual mandate truly is immense in scope, – every man, woman and child in the United States – and nature – compelled purchase of a product from private corporate interests. Despite all the clucking and tut tutting, there really never has been anything like it before. The Supreme Court Justices thought so too.

I have no idea what kind of blindered hubris led those on the left to believe the Roberts Court was going to be so welcoming to their arguments, and to be as dismissive of the challengers' arguments, as was the case. Yes, cases such as *Raich* and *Wickard* established Congress could regulate interstate commerce and *Morrison* and *Lopez* established there were limits to said power. But, no, none of them directly, much less conclusively, established this kind of breathtaking power grant as kosher against every individual in the country.

Despite the grumbling of so many commentators that the law was clear cut, and definitively established in favor of the mandate, it wasn't, and isn't. And I was not the only one on the left who found the challenging arguments serious, Professor Jonathan Turley did as well (see here and here).

There is no particular need to rehash *all* the different arguments, and iterations of them by the scores of commentators (not to mention the participants in the case, of course), that has already been done elsewhere, actually everywhere, ad nauseum. There is one area I do want to touch on, at least briefly, though. Limitations of power. This is an important concept in Commerce Clause law, which is why I tried to focus on it in the argument preview

article.

Simply put, the the question is, if the federal government can, via the Article I Congressional authority, stretch the reach of the Commerce Clause to every individual in the US, willing or not, as they did in the "ACA Individual Mandate" is there any power over the individual and/or the states, that is still out of bounds? Are there any limitations left on the ability of the federal to consume individual determination? What the Supreme Court looks for in such an inquiry are "limiting principles" that could constrain the power in the future. Another term of art used in the law is, is there any way to "cabin", i.e. constrain, the power?

In addition to the preview post, I also asked colleagues on Twitter (here and here) to describe proper concepts that would accomplish the goal. For over a day, until the reality that – gasp – this was also the concern of the justices, there was literally no discernible response. Once that reality, forced by the Court, set in however, attempts came fast and furious. Nearly all were rationalizations for why the ACA/mandate was necessary and/or desirable, but were not actual limiting principles.

It was a bit of a trick question, because the best lawyers in the government and amici did not do so hot in that regard either. Out of all I have seen, the one that struck me as fairly easily the best was propounded by Professor Jack Balkin:

> **The Moral Hazard/Adverse Selection Principle**
> Congress can regulate activities that substantially affect commerce. Under the necesary and proper clause, Congress can require people to engage in commerce when necessary to prevent problems of moral hazard or adverse selection created by its regulation of commerce. But if there is no problem of moral hazard or adverse selection, Congress

> cannot compel commerce. Courts can choose different standards of review to decide how much they want to defer to Congress's conclusion.

Nice, tight and definable. Not bad. Still leaves a lot of ground – likely far too much – open to suit the apparent Supreme Court majority forming. So, when you read, here or otherwise, discussion about "limiting principles" or "cabining", this is what is being contemplated.

As usual, Justice Anthony Kennedy is the critical swing. And Kennedy's general understanding (and consideration here) of liberty is instructive. The following lays it out quite well, using both quotes from last Tuesday's oral argument and background, and comes via Adam Liptak at the New York Times:

> Paul D. Clement, representing 26 states challenging the law, had a comeback. "I would respectfully suggest," he said, "that it's a very funny conception of liberty that forces somebody to purchase an insurance policy whether they want it or not."
> …..
> Justices tend to ask more questions of the lawyers whose positions they oppose, and Justice Kennedy posed six questions to Mr. Verrilli and just three to the two lawyers challenging the law.
>
> The questions to Mr. Verrilli were, moreover, mostly easy to read. They were crisp expressions of discomfort with the administration's arguments.
>
> "Can you create commerce in order to regulate it?" Justice Kennedy asked.
>
> "This is a step beyond what our cases have allowed, the affirmative duty to act to go into commerce" he said. "If that is so, do you not have a heavy burden of justification?"

> “Can you identify for us some limits on the commerce clause?” he asked.
>
> Those questions fit neatly within one strain of Justice Kennedy’s understanding of liberty, one he discussed at length last year in an opinion for a unanimous court.
>
> Limiting federal power, he wrote, “protects the liberty of all persons within a state by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.”

There is a Constitutional desire, and instruction to, colloquially, have limitation on federal power and to reserve rights to states and liberties to individuals. The Supreme Court, and Justice Kennedy (and to a lesser extent Chief Justice Roberts), in the ACA arguments was grappling with these concepts. How they find them, and decide them, will determine the outcome on the mandate.

One way or another, the case on the mandate will be decided. In the preview post before oral arguments began, I predicted either a 6-3 decision to uphold the constitutionality of the mandate or a 5-4 decision against it. The odds on the latter have soared. At this point, I would rate the odds at 50:50 either way. But, sometime – likely near the end of June – there will be a decision and the victory dance by the winning side and caterwauling and demeaning of the “politicized Court” by the losers will commence. That pattern will play out regardless of which party wins, and which party loses.

As described in both the instant post, and the

preview piece, the arguments are indeed contentious, but they are also quite real. There are fundamental differences, over fundamental interpretations of fundamental rights. And, despite the often PT Barnum like contentions of the ACA cheer squad on the left, and from the Obama Administration, the nature and reach of the mandate truly is unprecedented and never was "unquestionably constitutional" as so many claimed. The left created their own self sustaining echo chamber and convinced themselves a truly controversial mandate was self fulfilling and golden.

The arguments against the mandate by the challengers are not wrong or silly simply because made by the "other side". There IS merit to their concern, even if you ultimately believe the mandate should be upheld. Which has made it distressing, to be kind, to see the efforts of many of my colleagues on the left to demonize and degrade the questions and apparent inclination by the conservative bloc of the Roberts Court during oral arguments.

It took Jonathan Chait at New York less than a day after the fateful oral arguments to start salting the thought the court was somehow illegitimate:

> The spectacle before the Supreme Court this week is Republican justices seizing the chance to overturn the decisions of democratically-elected bodies. At times the deliberations of the Republican justices are impossible to distinguish from the deliberations of Republican senators.

Chait's fellow dedicated ACA supporter, Jonathan Cohn at The New Republic quickly weighed in with his hyperbolic joinder:

> Before this week, the well-being of tens of millions of Americans was at stake in the lawsuits challenging the Affordable Care Act.

> Now something else is at stake, too: The legitimacy of the Supreme Court.

Even Dahlia Lithwick and Professor Richard Hasen, both of whom I respect somewhere beyond immensely, in separate articles at Slate, joined the chorus of casting stones of Court legitimacy degradation.

Please, folks, just stop. The question on the mandate is legitimate, and the other side believes their position every bit as much as you do yours. While there is certainly case precedent in the general area, there is just as certainly none directly on point with the way the "commerce" in *this* mandate is framed and "regulated".

The Supreme Court is inherently a political body, at least in that its Justices are politically appointed. Presidential candidates of both stripes campaign on the type of Justices they would appoint if given the opportunity. Further, the Supreme Court is the final arbiter of the most controversial questions, that habitually involve mixed issues of politics and law, and has been ever since *Marbury v. Madison*.

Charges against the legitimacy of the Supremes have also been extant since the time of *Marbury v. Madison*, and continue into the modern set of decades with cries by the right against the Warren Court, to the bookend cries by the left against the Burger and Rehnquist Courts. The Supreme Court survived all those, and is still ticking after *Bush v. Gore* and *Citizen's United.* It will survive this too.

And, as David Bernstein pointed out, why in the world would the left undermine the Court's legitimacy when it is one Presidential appointment away from taking over the ideological majority? No kidding. I respectfully urge my colleagues on the left to step back, take a breath of air, and rethink the idea of degrading the Court over this case.

Those, however, are not the only reasons

Democrats and the left should take a step back and rethink how they are reacting to the SCOTUS consideration of the ACA mandate. I pointed out in the ACA/SCOTUS preview post that progressives and conservatives were both, strangely, arguing contrary to type and ideology on the mandate. In a really bright piece of counterintuitive and intelligent thought, Jon Walker points out just how true that was:

> If Conservatives get their way and the Supreme Court strikes down the individual mandate to buy health insurance, it would be a real victory for them; but in the end, the last laugh may be with actual progressives. While in this case an individual mandate was used to expand health coverage, similar individual mandates are the cornerstone for corporatist plans to unravel the public social insurance systems created by the New Deal/Great Society.
>
> The basic subsidies, exchanges and individual mandate design that defines the ACA are at the heart of many corporatists' attempts to destroy/privatizes the programs progressives support the most.
>
> There are are two main ways for the government to provide universal public goods. The first and normally best way is to have the government raise money through taxes and then use that money to directly provide the service to everyone. The other option is to create an individual mandate forcing everyone to buy the service from private corporations while having the government subsidize some of the cost. These needless middlemen mostly just increases costs for regular people and the government. This is why corporations love this setup and push hard for it.
> ….
> If the Supreme Court rules against this

> individual mandate in a way that basically makes it legally impossible to replace most of our current public insurance systems with mandated private systems, that should be seen as a big silver lining for progressives.

Go read the entire piece by Jon Walker, as it contains specific instances and discussions that are important.

In closing, I would just like to say it is NOT the case that the conservatives are definitely right in their challenge to the individual mandate in Obamacare, but it is a lot closer case than liberals make out, and liberals are being blind to the potential downside of it being upheld. All of these factors make the situation different than has been relentlessly painted; there are legitimate arguments on both sides and the Supreme Court will make a tough decision. Whatever it is, that will be their decision. It was a flawed law when it got to the Supremes, and they will still maintain legitimacy and respect when it leaves, regardless of how they sort the hash they were served.

[Article updated to reflect author Jon Walker for the last link, not David Dayen]