

**TESTIMONY OF KENNETH T. CUCCINELLI, II,
ATTORNEY GENERAL OF VIRGINIA
House Judiciary Committee
February 16, 2011**

Chairman Smith, Ranking Member Conyers, and distinguished members of the Committee: Thank you for inviting me to testify today. I am Kenneth T. Cuccinelli, II, and I currently serve as the Attorney General of the Commonwealth of Virginia. As you know, the Commonwealth is engaged in litigation with the federal government over the constitutionality of the Patient Protection and Affordable Care Act of 2010. I appreciate this opportunity to discuss the arguments and ideas that underpin Virginia's suit.

Despite all of the attention it has received, it should be noted that Virginia's challenge to the Patient Protection and Affordable Care Act is modest. We do not seek to overturn any prior decisions of the United States Supreme Court or develop any new doctrine. Rather, within the boundaries of constitutional text and precedent, we simply seek a determination that, in passing the individual mandate and penalty as part of the Patient Protection and Affordable Care Act, Congress exceeded the powers granted it by the Constitution.

Resolving such a suit is and has been one of the primary functions of the federal courts since the inception of the nation. As Justice O'Connor noted in *New York v. United States*, 505 U.S. 144, 155 (1992), a State which seeks the aid of the federal courts in resolving competing claims of state and federal power acts in accordance with the foundational and traditional function of those courts:

In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." The Federalist No. 82, p. 491 (C. Rossiter ed. 1961). Hamilton's prediction has proved quite accurate. While no one disputes the proposition that "the Constitution created a Federal Government of limited powers," *Gregory v. Ashcroft*, 501 U.S. 452, 457, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); and while the Tenth Amendment makes explicit that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324, 4 L. Ed. 97 (1816), the Court has resolved

questions “of great importance and delicacy” in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.

Turning to the merits of Virginia’s suit, the central issue is tied to the Commerce Clause. As you know, in the act itself, Congress asserted that the Commerce Clause empowered it to order private citizens, who were not presently engaged in commercial activity, to purchase insurance from private vendors or pay a penalty to the government. Such a use of the Commerce Clause is literally unprecedented. As the Congressional Research service noted when the Senate Finance Committee inquired as to the constitutionality of the mandate:

Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service.

Cong. Research Serv. *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 3 (2009).

While not dispositive, the mere fact that no Congress had ever attempted to use the Commerce Clause in this way casts grave doubt at to whether Congress has such a power. As the Supreme Court noted in *Printz v. United States*, 521 U.S. 898, 918 (1997), the fact that Congress has not asserted a particular power or practice for 200 years “tends to negate the existence of the congressional power . . .” claimed.

The gravamen of Virginia’s suit is that the claimed power exceeds Congress’s enumerated powers because it lacks any principled limit and is tantamount to a national police power-- that is, the power to legislate on matters of health, safety and welfare that was considered part of the reserve powers retained by the States at the time of the Founding.

Since *Wickard v. Filburn*, 317 U.S. 111 (1942), the United States Supreme Court has reached no further than to hold that Congress can regulate (1) the “use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons and things in interstate commerce,” and (3) “**activities** that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (emphasis added). Section § 1501 of Patient Protection and Affordable Care Act seeks to regulate **inactivity** affecting interstate commerce, a claimed power well in excess of the affirmative outer limits of the Commerce Clause, even as executed by the Necessary and Proper Clause. *See Gonzales v. Raich*, 545 U.S. 1 (2005). This claimed power also violates the negative outer limits of the Commerce Clause identified in *Lopez* and in *United States v. Morrison*, 529 U.S. 598 (2000). As was so clearly stated by the Court in *Morrison*: “We **always** have rejected readings of the Commerce Clause and the scope of federal power

that would permit Congress to exercise a police power.” *Morrison*, 529 U.S. at 618-19 (emphasis in original).

In the face of these problems with the Commerce Clause argument, the federal government has adopted a fall-back position in the various cases challenging the Patient Protection and Affordable Care Act. Despite no indication from Congress that it thought it was doing anything other than attempting to use its Commerce Clause powers, and despite the protests of the President that the individual mandate and penalty were most definitely not taxes, the federal government now claims that the mandate and penalty are merely an exercise of Congress’s taxing power.

While the Commerce Clause argument advanced by the federal government is unprecedented, the taxing power argument is simply radical.

At the outset, it is important to note that the taxing power argument is inconsistent with the very words chosen by Congress. What lawyers from the Justice Department now call a “tax” was not called a tax by Congress; it is identified in the Patient Protection and Affordable Care Act as a “penalty.” Accordingly, the first flaw in the taxing power argument is that it, by necessity, ignores the words that Congress chose to use.

Even if the Justice Department could overcome the fact that Congress chose to explicitly impose a penalty as opposed to levying a tax, the taxing power argument would still fail. The United States Supreme Court has long recognized that “taxes” and “penalties” are separate and distinct, stating that “[a] tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.” *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)). As the *La Franca* court held, the word “tax” and the word “penalty”

are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled

La Franca, 282 U.S. at 572. To prevail, the federal government’s taxing power argument requires that courts ignore Congress’s express decision to denominate the penalty a “penalty” and it has to “alter the essential nature” of the penalty by ignoring its function so that it can be called a tax.

The Justice Department has tried to avoid the Supreme Court’s consistent view, that, substantively, a penalty is an imposition for failing to obey a command of government, by resorting to idiosyncratic definitions. It has staked out the position that unlawful acts are limited to criminal violations, so that penalties for violating non-criminal statutes are not penalties at all. This is simply not the law.

The idea that it is only unlawful to violate criminal statutes as opposed to civil statutes is incorrect as a simple matter of definition. *Black's Law Dictionary*, 6th Edition, defines “unlawful” as:

That which is contrary to, prohibited, or unauthorized by law. That which is not lawful. The acting contrary to, or in defiance of the law; disobeying or disregarding the law. Term is equivalent to without excuse or justification. While necessarily not implying the element of criminality, it is broad enough to include it.

Black's at 1536. Clearly, “unlawful” comprehends the violation of any law, whether civil or criminal.

This plain-meaning, common-sense definition finds firm support in precedents of the Supreme Court. For instance, in *Dep't. of Rev. of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994), the Court explicitly recognizes “civil penalties” as being distinct from “taxes”, noting that “tax statutes serve a purpose quite different from civil penalties”

Additionally, the Justice Department has argued that the penalty must be a tax because it “is codified in the Internal Revenue Code in a subtitle labeled ‘Miscellaneous Excise Taxes.’” This formalistic argument is not likely to prevail because it is foreclosed by both statutory and Supreme Court authority. A provision of the Internal Revenue Code, 26 U.S.C. § 7806(b), provides that “[n]o inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision of this title” Furthermore, the United States Supreme Court, in finding that an exaction that Congress had denominated a “tax”, located in a section of the Internal Revenue Code titled “Miscellaneous Excise Taxes”, was actually a penalty and not a tax, stated that “[n]o inference of legislative construction should be drawn from the placement of a provision in the Internal Revenue Code.” *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. at 223.

Even if it could be assumed that the penalty was a tax, it would still need to pass muster under an enumerated power other than the taxing power so long as it is being used for regulation. See *Child Labor Tax Case*, 259 U.S. 20 (1922); *United States v. Butler*, 297 U.S. 1, 68 (1936); *Linder v. United States*, 268 U.S. 5, 17-18 (1925). While some have suggested that courts can ignore these decisions, the Supreme Court has not overruled them. In fact, the relevant rationale of the *Child Labor Tax Case* was cited with approval by the Supreme Court in 1994, when the Court wrote:

Yet we have also recognized that “there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.” *Id.*, at 46 (citing *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)).

Kurth Ranch, 511 U.S. at 779.

Given that the Supreme Court as recently as 1994 cited the *Child Labor Tax Case* for the very proposition for which the Commonwealth offers it, it cannot be demonstrated that it is no longer good law. Furthermore, the holdings of these cases are perfectly consistent with the overarching principle found in *Morrison*, that the Court has “**always** . . . rejected readings of . . . the scope of federal power that would permit Congress to exercise a police power.” *Morrison*, 529 U.S at 618-19 (emphasis in original).

Comparisons to Social Security taxes and the inheritance tax do not aid the Justice Department’s case, but rather, underscore why it fails. It is true that the Court upheld the Social Security tax, but it did so because it was a valid excise on a voluntary activity/transaction-- the employment relationship. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 , 580-81 (1937). Nothing in that opinion suggests that Congress has the power to impose an employment excise tax on workers who are not working or on businesses that do not currently exist. Similarly, the Court upheld the estate tax in *Knowlton v. Moore*, 178 U.S. 41 (1900), as an excise tax or duty; it was upheld not as a tax on a person or even a person’s death, but rather, as a tax on a commercial event-- the transfer of property. *Knowlton*, 178 U.S. at 78 (estate taxes “concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax [could be] levied . . .”).

Like the Commerce Clause argument, the taxing power argument ultimately fails because it is not bounded by any principled limits, and therefore, arrogates to the federal government a national police power denied to it by the Constitution. As the Justice Department has summarized its position, anything that “imposes involuntary pecuniary burdens for a public purpose . . . is an exercise of the taxing power. . . ,” and therefore, is constitutional. This radical position has already been rejected by the Supreme Court in *Morrison* as quoted above.

Faced with these legal obstacles, supporters of the Patient Protection and Affordable Care Act often make arguments that are not based on the Constitution or on decisions of the Supreme Court, but rather, are nothing more than appeals to address a pressing national problem. The argument is that there is a serious problem that must be fixed, and thus, the Patient Protection and Affordable Care Act must be constitutional because it is an attempt to solve that problem.

In a society based on the rule of law, such an argument cannot be credited. As the Supreme Court held in *New York v. United States*, 505 U.S. 144, 187-88 (1992):

Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear “formalistic” in a given case to partisans of the measure at issue, because such measures are typically the product of the era’s perceived necessity. But the Constitution protects us from our own best intentions: It divides power

among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. . . . [Something may be a] pressing national problem, but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.

Chairman Smith, Ranking Member Conyers, and members of the Committee, this concludes my remarks. Thank you again for the opportunity to share my views.