Senator Cruz Questions for the Record for
Andy Grewal, Associate Professor of Law, University of Iowa College of Law
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
"Rewriting the Law: Examining the Process That Led to the ObamaCare Subsidy Rule"
Thursday, June 4, 2015

General Question

1. **Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee's attention?**

Response of Professor Andy Grewal

At the hearing, Senator Sessions correctly pointed out that the law (i.e., the ACA) does not broadly command the President to provide health coverage to "all Americans." In her testimony, Ms. Wydra purportedly refuted Senator Sessions' comments, observing that the heading of Title I refers to coverage for "all Americans."[1]

The Subcommittee should be aware that heading or other descriptors in an Act do not reflect positive law. The President cannot merely look at an Act's almost-always broad and aspirational heading and enforce that heading, to the exclusion of the law's operative provisions.

It would be a strange world if thousands of pages of legislative text could be ignored in favor of the soundbite captured in the heading of a bill. I am not aware of any legal scholar or jurist, from any part of the ideological spectrum, who disputes this. Senator Sessions correctly noted that the ACA does not blindly command the President to provide health care to all Americans, but instead contains actual laws that must be observed. Ms. Wydra's response to Senator Sessions was misguided.

Because *King v. Burwell* is a tax case, I will also bring Section 7806 of the tax code to the Subcommittee's attention. That statute flatly denies legal effect to descriptive material in the tax code. This provides analogous support for the commonsense view that the ACA's provisions, not its headings, reflect the law of the land.

[1] See also http://www.msnbc.com/rachel-maddow-show/the-importance-setting-sessions-straight (discussing Sessions - Wydra interaction).

- Ms. Wydra and Mr. Weiner invoked Principles of Interpretation, particularly the Presumption Against Ineffectiveness and the Presumption Against Absurdity, in their justifications for the IRS rule subsidizing coverage for individuals from States that opted not to create exchanges. Do you think these principles are applicable in this circumstance? Why or why not?

Response of Prof. Andy Grewal

Neither of the suggested canons should play any role. If credits were denied for participants on federally-run exchanges, Section 36B would not be ineffective. It would continue to allow credits for participants on State-established exchanges. Consequently, the IRS rule is simply not needed to give effect to the statute.

The absurdity canon also plays no role. As Chief Justice Marshall long ago explained, that canon allows for a court to ignore the plain meaning of a statute when "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, 17 U.S. 122, 203 (1819) (Marshall, Ch. J.)).

I do not think that all of humanity would unite in condemning a holding for the challengers in *King v. Burwell.* Denying credits to participants on federally-run exchanges may reflect bad policy, but it's not an absurd result, given that credits could be obtained if States were to establish insurance exchanges. Additionally, the challengers raise concerns regarding the imposition of penalties, and a holding that protects them from such penalties does not come close to the level of absurdity outlined by C.J. Marshall.

A holding against the IRS would lead to a difficult, but not absurd, result for many participants on federally-run exchanges. As I've previously written, I believe that the legislature should act quickly to address the hardships faced by these innocent consumers. However, a legal decision that favors the challengers would not be absurd.

Questions for the Record from Senator Coons
June 4, 2104 Hearing of the Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

Questions for Professor Grewal

You testified that you "do not take any position on the validity of the ObamaCare subsidy rule." You have, however, extensively studied and written about §36B.

1. Do you dispute that the ACA was broadly and perhaps unanimously understood to mean what Treasury says it means at the time the law was passed?

A. I have not studied whether statements made contemporaneously with the ACA's enactment are consistent with the Treasury regulation. So, I cannot opine whether Treasury's approach is consistent with the contemporary understanding. In any event, I am not inclined to make inquiries into that issue, because I do not believe that the subjective statements of individual legislators or legislative committees can bear on the objective meaning of a statute enacted by the whole Congress and signed by the President.

If a Gallup poll showed that each legislator wanted to restrict subsidies to State-established exchanges, I would give those statements no weight, except to the extent that those sentiments were expressed in the text. I would similarly dismiss a poll showing that the legislators wanted to extend subsidies to federally-established exchanges, again except to the extent that those sentiments were expressed in the text. I also attach no interpretive weight to statements made by purported architects of the ACA.

2. Have you considered or studied the arguments made by the government and amici, insofar as they conclude that the text of the statute permits the availability of premium tax credits to participants on federally-run Exchanges?

A. I have generally considered the arguments, but not in the same level of detail that I have studied other issues related to Section 36B.

3. Do you have an opinion as to whether to text of the statute permit the availability of premium tax credits to participants on federal-run Exchanges? If so, what is your opinion? If you, as an expert in §36B, cannot conclude that the text forecloses such an interpretation, does that not strongly suggest that such an interpretation is reasonable?

A. I do not have any final opinion on whether the text of the statute permits the availability of premium tax credits to participants on federal-run Exchanges. I have studied Section 36B in considerable detail and believe that that statute, standing alone, allows for credits only on State-established exchanges. However, the IRS argues that Sections 1311 and 1321 of the ACA, read in conjunction with Section 36B, grants credits

to participants on federal-run exchanges. I have not studied Sections 1311 and 1321 in fine detail and thus cannot offer a scholarly assessment of the government's arguments.

I started following *King v. Burwell* by accident, when last winter I was consulted on a retroactivity issue related to the Court's eventual decision.[1] By this point, I did not think it worthwhile to focus my scholarly efforts on the Question Presented in that case. There was already much scholarly commentary on the *King v. Burwell* issue, and it was too late for me to prepare an *amicus* brief. But with my interest in Section 36B triggered, I decided to comment on the case generally and later exhaustively studied the statute for new, lurking issues.

If I closely studied Sections 36B, Sections 1311, and 1321 and was unable to reach a decision about the unambiguous meaning of the statute, that would certainly lead me to support *Chevron* deference for the Government's position. But I have not made that study and my hesitation to opine on that issue should establish no inferences. If I were forced to decide *King v. Burwell,* notwithstanding my incomplete analysis of all relevant authorities, I would probably conclude that the challengers' interpretation was better than the IRS's, but that the IRS's interpretation could nonetheless be a reasonable one.

I prefer to definitively opine on major issues only after having extensively studied them, as I have done so regarding the 3 circumstances of IRS overreach that I presented in my original testimony. I also repeat my skepticism that, whether or not the Treasury regulation on the federal-exchange issue reflects a valid interpretation of the statute, it seems unlikely that the IRS considered itself bound by the statutory language, given its open re-writing of Section 36B in other contexts.

I thank Senator Coons for his thoughtful attention to these important matters.

[1] That consultation triggered a scholarly interest in *King v.* Burwell, which resulted in a published article. See Grewal, *How* King v. Burwell *Creates Tax Problems for Consumers and What The Treasury Can Do About It*, 32 Yale Journal of Reg. Online (2015).