

Written Statement  
of  
Lee A. Casey  
Before the Committee on Ways and Means  
United States House of Representatives  
July 10, 2012

Thank you, Mr. Chairman and members of the Committee.

Let me say at the outset that I am speaking here on my own behalf and not on behalf of my law firm, its clients, or any other group with which I am associated.

In assessing the Supreme Court's ruling in *National Federation of Independent Business, et al., ("NFIB") v. Sebelius, et al.*, Nos. 11-393, 11-398 and 11-400 (June 28, 2012), it is important to note that the decision has articulated clear limits on both the Commerce Clause and the Necessary and Proper Clause, holding that neither of these provisions can form the basis of a general federal police power like that enjoyed by the States. In addition, the Court also made clear that its decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), does have teeth. Congress cannot use federal spending as a means to coerce the States into adopting or implementing federal programs, and all of the States now have the choice

whether or not to implement the Affordable Care Act's ("ACA") Medicaid expansion provisions, with only the new federal funding at risk if they choose not to participate. These aspects of the decision are enormously significant and positive.

At the same time, in upholding the ACA's individual mandate as a tax, the Supreme Court has fashioned a breathtaking new power for Congress. In sustaining the mandate on this ground, it has necessarily held that Congress can impose a tax not only on property, or income, or some type of activity, but also on the mere failure to undertake some prescribed course of action. This ruling suggests that the taxing power may now present the very same potential for morphing into a constitutionally forbidden general federal police power as would an unlimited power to regulate interstate commerce.

Congress's power to lay and collect taxes has, of course, long been interpreted broadly. The Supreme Court has made clear that a tax is not invalid merely because there is a regulatory, rather than only a fiscal, purpose behind the measure. Congress has imposed taxes on an almost unimaginable variety of products and transactions – from fishing rods, to bows and arrows, to sea voyages. That regulation, however, has in the past been directed at encouraging or discouraging particular conduct – taxes on wagering and/or winnings, for example.

The ACA's requirement to have and maintain a congressionally prescribed level of health insurance benefits for yourself and your family is far more direct. It does not encourage the purchase of health insurance by offering some tax benefit – such as a credit or exemption from otherwise applicable tax obligations – for those who purchase a particular health benefit package. This, for example, is how Congress has chosen to encourage home ownership, by offering specific tax benefits (in the form of income tax deductions for interest payments) to those who obtain mortgages to buy a house.

Nor does the mandate tax a particular type of conduct or transaction – for example, by imposing a tax on the purchase of health care services, with credits or deductions available for those who pay for these services through an approved health care insurance policy. Rather, the mandate imposes a tax on the status of not having that insurance. It is the equivalent not of a tax on gambling or travel, but on not gambling or not traveling.

As is the case with respect to Congress's exercise of its power to regulate interstate commerce, it is difficult to identify any precedent where Congress has imposed a tax on the simple *failure* to buy some good or service. And, as was the case under the Commerce Power, if Congress ever thought that it could regulate conduct through the simple expedient of taxing the failure to make such purchases, this extraordinary power would surely have been used before now.

Moreover, just as under the Commerce Power, the ability to impose a tax on not, for example, taking a boat trip also lacks a neutral, judicially enforceable limiting principle that could or would keep this power from simply serving as the basis for a general federal police power. Thus, can Congress impose a tax on anyone who does not own an “EV” or electrically-powered vehicle (as opposed to providing credits for those that do) so as to reduce green-house gas emissions nationwide? Can it impose taxes on those who do not consume a particular quota of fruits or vegetables, or dairy products, or cereals, or beef, pork, chicken, sugar, or the products of any of the other industries whose representatives populate these halls on a daily basis? The Court’s decision in *NFIB v. Sebelius* suggests that the answer to these questions is yes.

That decision having been made, the question becomes what limits, if any, is the Supreme Court now prepared to enforce on Congress’s power to lay and collect taxes. Certainly, the Court continues to acknowledge that there are limits to the taxing power, at least in theory: “Congress’s ability to use its taxing power to influence conduct is not without limits.” Slip. Op. at 42. As a practical matter, the taxing power remains a relatively blunt regulatory instrument, which the Court believes offers some limit to its scope: “Congress’s authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more.” Slip Op. at 43. In addition, the Court restated its position that a tax

which is a “mere penalty” will not be sustained under the taxing power, *id.* (citing *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994)), although it also declined to “decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.” Slip Op. at 43. But, since the *NFIB* Court also noted that “more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures,” Slip. Op. at 42, the real world viability of these limitations remains very much in doubt.

The *NFIB* Court also severely restricted application of the Constitution’s other basic limitation on the taxing power – the requirement that “direct” taxes be apportioned among the States. U.S. Const. Art. I, § 9, cl. 4 (“No capitation, or other direct, Tax shall be laid unless in Proportion to the Census or Enumeration herein before directed to be taken.”). Apportionment means that direct taxes are paid in proportion to each State’s population. It is a cumbersome process that results in the residents of some States paying more, or less, than the residents of others. This is why direct taxation has been such a rare phenomenon throughout our history.

The Court avoided holding the individual mandate unconstitutional as an unapportioned, direct tax by narrowing the meaning of “direct” taxes to capitation or “head” taxes and taxes on real property – although both the constitutional text and the history of the Sixteenth Amendment, which was adopted specifically to

give Congress the “power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration,” U.S. Const. Amend. 16, are inconsistent with this conclusion.

At this time, therefore, judicially enforceable limitations on Congress’s power to lay and collect taxes may be more apparent than real. Indeed, the Court’s ruling in *NFIB v. Sebelius* raises the question whether Congress itself can impose practical limits on the taxing power. This is because, in upholding the ACA’s individual mandate as a “tax,” the Court suggested that it – rather than Congress – was the ultimate judge of which enumerated power Congress was exercising. This rule, if actually applied, would not only vastly expand the power to lay and collect taxes, but it would take from Congress the ability to determine whether or not it actually is imposing taxation.

The individual mandate was, of course, not enacted as a tax. During the legislative process, its sponsors disclaimed any such intent, as did the President in signing the bill into law. Moreover, the statutory language setting forth Congress’s findings in support of the mandate referred only to Congress’s power to regulate interstate commerce. *See* Pub. L. No. 111-148, 124 Stat. 242-244. Nevertheless, the Court concluded that the ACA’s “requirement that certain individuals pay a

financial penalty for not obtaining health insurance may reasonably be characterized as a tax,” Slip. Op. at 44.

In reaching this result, the Court relied heavily on the longstanding rule that, in determining whether or not a particular exaction is a “tax,” the Court will disregard the label Congress may have used and “view[] its substance and application.” *Id.* at 34. This, of course, is based on the obviously correct premise that Congress can neither expand nor contract its enumerated powers, including the power to lay and collect taxes, by simple labeling.

But, the *NFIB* Court went further, actually suggesting that the Judiciary is not bound by Congress’s own, clear reliance on the Commerce Power in enacting the individual mandate. In that regard, the Court stated that the “question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.” Slip. Op. at 39 (quoting *Woods v. Cloyd W. Miller, Co.*, 333 U.S. 138, 144 (1948)).

If this were true, of course, then Congress would no longer be master of its own legislative processes, and could not itself choose whether and when to exercise its power to tax, or any other of its enumerated powers. Fortunately, neither *Woods* nor the *NFIB* Court’s actual mode of analysis requires such a result. *Woods* involved a challenge to Title II of the Housing and Rent Act of 1947. This

law continued certain rent controls originally imposed by Congress during World War II. The statute was challenged as beyond Congress's war powers because it was enacted after hostilities had ended (although before a peace treaty was ratified). The lower court agreed, and also concluded that – “even if the war power continues, Congress did not act under it because it did not say so, and only if Congress says so, or enacts provisions so implying, can it be held that Congress intended to exercise such power.” *Woods*, 333 U.S. at 140.

The Supreme Court reversed, concluding that the war power did indeed support the challenged legislation, and also stating that “[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.” *Id.* at 144. However, the Court clearly did not mean to suggest by this that Congress cannot choose the power under which it acts, or that the Judiciary is not bound by that decision once made and clearly expressed. Indeed, in *Woods*, the Court went on to examine the statute's legislative history to determine Congress's intent in this regard, concluding that “it is plain from the legislative history that *Congress was invoking* its war power to cope with a current condition of which the war was a direct and immediate cause.” *Id.* (emphasis added).

This conclusion is also supported by the Court's methodology in *NFIB v. Sebelius*, if not by its language. Although certainly making clear that “labels” do

not matter in constitutional analysis, in upholding the mandate as a tax the Court also considered congressional intent. In particular, in explaining why it believed the penalty for failure to comply with the individual mandate operated like a tax, positing that individuals could simply choose to pay and still be in compliance with the law, the Court noted that “Congress did not think it was creating four million outlaws.” Slip Op. at 38. It also is true that, although Congress clearly invoked the Commerce Power in enacting the mandate, it did not in the text of the statute disclaim reliance on the taxing power.

In the future, therefore, Congress can put some limitation on the taxing power – albeit a self-imposed limitation – by stating plainly when it is, and when it is not, invoking its power to lay and collect taxes. Had the ACA not merely identified the Commerce Power as the source of authority for the individual mandate, but also specifically disclaimed reliance on the taxing power, the Court would not have been able to claim that this was merely a matter of labels. Such a “truth-in-legislating” requirement would also permit the citizenry at large to accurately assess responsible for any particular exaction. This will help to preserve the accountability the Constitution sought to guarantee by granting Congress limited and enumerated, rather than general, legislative powers.

I would be pleased to answer any questions.