CHENEY WELL WISHES

Mr. KYL. Mr. President, first I would like to take a moment to wish Vice President Cheney well as he recovers from his big-time heart transplant surgery. My wife Caryll and I have him in our thoughts and prayers, and we send our best wishes to him and to his entire family. I am sure ''the Angler,'' as he was called, would rather be out fishing in Wyoming on the Snake River, where I know he has been very happy. I hope he can get back out West soon. In the meantime, I know he is fortified by his wonderful family, his wife Lynn, his two daughters, and his grandchildren. We wish him all the best.

RYAN BUDGET

Mr. KYL. In a recent column in the Arizona Republic, my friend Bob Robb laid out a very thoughtful contrast between President Obama's budget and the alternative put forth by House Budget Committee chairman PAUL RYAN, which the House of Representatives will be acting on this week. In his column Robb notes that the Ryan budget would get the Federal deficit below 3 percent of GDP by 2015 and after a decade would reduce our debt-to-GDP ratio from today's 100 percent to about 87 percent or just under the share many economists believe affects private sector economic performance and casts doubt on the government's ability to even repay its obligations. Robb explains that ''despite the caterwauling of critics, Ryan doesn't achieve this through brutal budget cuts. Quite the contrary.'' He explains why the Ryan budget would allow spending to increase about 3 percent each year, compared to the Obama budget's about 5 percent annual increases, and he concludes that low interest rates are currently muting the effects of our growing debt on the economy, but it could change overnight. ''And if it changes, the federal government will have to take action much more drastic and quicker than the relatively gentle and gradual pathway provided by the Ryan budget.''

I hope Senators will take a few moments to review this column in its entirety. I ask unanimous consent that it be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Arizona Republic, Mar. 23, 2012]

RYAN HAS A LESS-PAINFUL DEBT PLAN

(By Robert Robb)

Critics of Rep. Paul Ryan's proposed budget resolution are almost universally unserious about getting federal debt and deficits under control. The country will be very lucky if it gets a chance to implement as gentle and gradual a path to fiscal sobriety as the Ryan plan outlines.

Economists believe there are two red lines for debt and deficits. If accumulated debt exceeds 90 percent of GDP, it begins to affect private-sector economic performance and raise questions about the ability of the government to pay it back. And annual deficits of more than 3 percent of GDP are regarded as a sign of a government that has lost control of its finances.

Right now, total federal debt exceeds 100 percent of GDP. The deficit is 8.5 percent of GDP. And that's the lowest it's been in four years.

The Ryan budget would get the annual deficit below 3 percent of GDP by 2015. At the end of the 10-year planning horizon, total federal debt would be an estimated 87 percent of GDP, barely out of the red zone.

Despite the caterwauling of critics, Ryan doesn't achieve this through brutal budget cuts. Quite the contrary.

Under Ryan's budget, federal spending would increase from $3.6 trillion today to $4.9 trillion 10 years from now. That's an average annual rate of increase of around 3 percent. Hardly a starvation diet.

What is the alternative to Ryan's plan to get the federal government out of the red zone on debt and deficits? It certainly isn't President Barack Obama's budget.

Under Obama's budget, the annual deficit wouldn't get under 3 percent of GDP until 2017. That would mean eight consecutive years of exceeding the deficit speed limit. That's not a country in control of its finances.

Under Obama's budget, the country would never get below 100 percent of GDP in terms of total debt. After 10 years, the country would still be deep in the red zone.

Rather than increase federal spending to $4.9 trillion over 10 years, Obama would increase it to $5.8 trillion—or nearly 5 percent a year, compared with Ryan's 3 percent.

Obama's tax increases aren't really to reduce the deficit, as he claims. They are to support his higher rate of growth in spending.

Right now, there's not a political urgency to do something meaningful about debt and deficits because the federal government can borrow a seemingly unlimited amount of money at very low interest rates.

But that could change. And it could change overnight. And if it changes, the federal government will have to take action much more drastic and quicker than the relatively gentle and gradual pathway provided by the Ryan budget.

The most controversial parts of the Ryan budget—tax reform and Medicare reform—are actually irrelevant to the task of getting out of the red zone for debt and deficits. The tax reform is intended to be revenue-neutral. The Medicare reform doesn't kick in until after the 10-year planning horizon of the budget resolution. It's intended to reduce the debt problem of the future, not get us out of our current hole.

If Democrats were serious about doing something about debt, there would be room for discussion about changes to the Ryan blueprint. The Simpson-Bowles Commission proposed tax reform similar to what Ryan advocates, lower rates on a broader base, but in a way that increases revenues to the government. Ryan proposes spending $440 billion more on defense over 10 years than does Obama. The relative allocations within the Ryan spending limits are certainly arguable.

But Democrats aren't serious, so the Ryan budget is the only current alternative to just waiting for the credit markets to start saying no. If that day arrives, the Ryan plan will look awfully lovely in retrospect.

HEALTH CARE

Mr. KYL. Mr. President, as we know, today the Supreme Court began hearing arguments about the constitutionality of the affordable care act. It is one of the most critically important Supreme Court cases of our time. A Wall Street Journal editorial noted last Friday:

Few legal cases in the modern era are as consequential, or as defining, as the challenges to [this law]. . . . The powers that the Obama administration is claiming change the structure of the American government as it has existed for 225 years. . . . The Constitutional questions the Affordable Care Act poses are great, novel, and grave.

The editorial, entitled ''Liberty and ObamaCare,'' lays out the constitutional problems with the affordable health care act and focuses on the bill's centerpiece: the individual mandate to purchase health insurance. As the editorial notes, the case against this provision is anchored in ample constitutional precedent, and I quote their conclusion:

The Commerce Clause that the government invokes to defend such regulation has always applied to commercial and economic transactions, not to individuals as members of society. . . . The Court has never held that the Commerce Clause is an ad hoc license for anything the government wants to do.

I urge my colleagues to read this article, and I ask unanimous consent that it be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[The Wall Street Journal, Mar. 22, 2012]

LIBERTY AND OBAMACARE

Few legal cases in the modern era are as consequential, or as defining, as the challenges to the Patient Protection and Affordable Care Act that the Supreme Court hears beginning Monday. The powers that the Obama Administration is claiming change the structure of the American government as it has existed for 225 years. Thus has the health-care law provoked an unprecedented and unnecessary constitutional showdown that endangers individual liberty.

It is a remarkable moment. The High Court has scheduled the longest oral arguments in nearly a half-century: five and a half hours, spread over three days. Yet Democrats, the liberal legal establishment and the press corps spent most of 2010 and 2011 deriding the government of limited and enumerated powers of Article I as a quaint artifact of the 18th century. Now even President Obama and his staff seem to grasp their constitutional gamble.

Consider a White House strategy memo that leaked this month, revealing that senior Administration officials are coordinating with liberal advocacy groups to pressure the Court. ''Frame the Supreme Court oral arguments in terms of real people and real benefits that would be lost if the law were overturned,'' the memo notes, rather than ''the individual responsibility piece of the law and the legal precedence [sic].'' Those nonpolitical details are merely what ''lawyers will be talking about.''

The White House is even organizing demonstrations during the proceedings, including a '' 'prayerful witness' encircling the Supreme Court.'' The executive branch is supposed to speak to the Court through the Solicitor General, not agitprop and crowds in the streets.

The Supreme Court will not be ruling about matters of partisan conviction, or the President's re-election campaign, or even about health care at all. The lawsuit filed by 26 states and the National Federation of Independent Business is about the outer

boundaries of federal power and the architecture of the U.S. political system.

The argument against the individual mandate—the requirement that everyone buy health insurance or pay a penalty—is carefully anchored in constitutional precedent and American history. The Commerce Clause that the government invokes to defend such regulation has always applied to commercial and economic transactions, not to individuals as members of society.

This distinction is crucial. The health-care and health-insurance markets are classic interstate commerce. The federal government can regulate broadly—though not without limit—and it has. It could even mandate that people use insurance to purchase the services of doctors and hospitals, because then it would be regulating market participation. But with ObamaCare the government is asserting for the first time that it can compel people to enter those markets, and only then to regulate how they consume health care and health insurance. In a word, the government is claiming it can create commerce so it has something to regulate.

This is another way of describing plenary police powers—regulations of private behavior to advance public order and welfare. The problem is that with two explicit exceptions (military conscription and jury duty) the Constitution withholds such power from a central government and vests that authority in the states. It is a black-letter axiom: Congress and the President can make rules for actions and objects; states can make rules for citizens.

The framers feared arbitrary and centralized power, so they designed the federalist system—which predates the Bill of Rights—to diffuse and limit power and to guarantee accountability. Upholding the ObamaCare mandate requires a vision on the Commerce Clause so broad that it would erase dual sovereignty and extend the new reach of federal general police powers into every sphere of what used to be individual autonomy.

These federalist protections have endured despite the shifting definition and scope of interstate commerce and activities that substantially affect it. The Commerce Clause was initially seen as a modest power, meant to eliminate the interstate tariffs that prevailed under the Articles of Confederation. James Madison noted in Federalist No. 45 that it was ''an addition which few oppose, and from which no apprehensions are entertained.'' The Father of the Constitution also noted that the powers of the states are ''numerous and infinite'' while the federal government's are ''few and defined.''

That view changed in the New Deal era as the Supreme Court blessed the expansive powers of federal economic regulation understood today. A famous 1942 ruling, Wickard v. Filburn, held that Congress could regulate growing wheat for personal consumption because in the aggregate such farming would affect interstate wheat prices. The Court reaffirmed that precedent as recently as 2005, in Gonzales v. Raich, regarding homegrown marijuana.

The Court, however, has never held that the Commerce Clause is an ad hoc license for anything the government wants to do. In 1995, in Lopez, it gave the clause more definition by striking down a Congressional ban on carrying guns near schools, which didn't rise to the level of influencing interstate commerce. It did the same in 2000, in Morrison, about a federal violence against women statute.

A thread that runs through all these cases is that the Court has always required some limiting principle that is meaningful and can be enforced by the legal system. As the Affordable Care Act suits have ascended through the courts, the Justice Department has been repeatedly asked to articulate some benchmark that distinguishes this specific individual mandate from some other purchase mandate that would be unconstitutional. Justice has tried and failed, because a limiting principle does not exist.

The best the government can do is to claim that health care is unique. It is not. Other industries also have high costs that mean buyers and sellers risk potentially catastrophic expenses—think of housing, or credit-card debt. Health costs are unpredictable—but all markets are inherently unpredictable. The uninsured can make insurance pools more expensive and transfer their costs to those with coverage—though then again, similar cost-shifting is the foundation of bankruptcy law.

The reality is that every decision not to buy some good or service has some effect on the interstate market for that good or service. The government is asserting that because there are ultimate economic consequences it has the power to control the most basic decisions about how people spend their own money in their day-to-day lives. The next stops on this outbound train could be mortgages, college tuition, credit, investment, saving for retirement, Treasurys, and who knows what else.

Confronted with these concerns, the Administration has echoed Nancy Pelosi when she was asked if the individual mandate was constitutional: ''Are you serious?'' The political class, the Administration says, would never abuse police powers to create the proverbial broccoli mandate or force people to buy a U.S.-made car.

But who could have predicted that the government would pass a health plan mandate that is opposed by two of three voters? The argument is self-refuting, and it shows why upholding the rule of law and defending the structural checks and balances of the separation of powers is more vital than ever.

Another Administration fallback is the Constitution's Necessary and Proper Clause, which says Congress can pass laws to execute its other powers. Yet the Court has never hesitated to strike down laws that are not based on an enumerated power even if they're part of an otherwise proper scheme. This clause isn't some ticket to justify inherently unconstitutional actions.

In this context, the Administration says the individual mandate is necessary so that the Affordable Care Act's other regulations ''work.'' Those regulations make insurance more expensive. So the younger and healthier must buy insurance that they may not need or want to cross-subsidize the older and sicker who are likely to need costly care. But that doesn't make the other regulations more ''effective.'' The individual mandate is meant to offset their intended financial effects.

Some good-faith critics have also warned that overturning the law would amount to conservative ''judicial activism,'' saying that the dispute is only political. This is reductive reasoning. Laws obey the Constitution or they don't. The courts ought to defer to the will of lawmakers who pass bills and the Presidents who sign them, except when those bills violate the founding document.

As for respect of the democratic process, there are plenty of ordinary, perfectly constitutional ways the Obama Democrats could have reformed health care and achieved the same result. They could have raised taxes to fund national health care or to make direct cross-subsidy transfers to sick people. They chose not to avail themselves of those options because they'd be politically unpopular. The individual mandate was in that sense a deliberate evasion of the accountability the Constitution's separation of powers is meant to protect.

Meanwhile, some on the right are treating this case as a libertarian seminar and rooting for the end of the New Deal precedents. But the Court need not abridge stare decisis and the plaintiffs are not asking it to do so. The Great Depression farmer in Wickard, Roscoe Filburn, was prohibited from growing wheat, and that ban, however unwise, could be reinstated today. Even during the New Deal the government never claimed that nonconsumers of wheat were affecting interstate wheat prices, or contemplated forcing everyone to buy wheat in order to do so.

The crux of the matter is that by arrogating to itself plenary police powers, the government crossed a line that Justice Anthony Kennedy drew in his Lopez concurrence. The ''federal balance,'' he wrote, ''is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of government has tipped the scale too far.''

The constitutional questions the Affordable Care Act poses are great, novel and grave, as much today as they were when they were first posed in an op-ed on these pages by the Washington lawyers David Rivkin and Lee Casey on September 18, 2009. The appellate circuits are split, as are legal experts of all interpretative persuasions.

The Obama Administration and its allies are already planning to attack the Court's credibility and legitimacy if it overturns the Affordable Care Act. They will claim it is a purely political decision, but this should not sway the Justices any more than should the law's unpopularity with the public.

The stakes are much larger than one law or one President. It is not an exaggeration to say that the Supreme Court's answers may constitute a hinge in the history of American liberty and limited and enumerated government. The Justices must decide if those principles still mean something.

Mr. KYL. Finally, continuing on the point about the argument on ObamaCare and referring to a different piece that appeared in the Wall Street Journal, I wanted to talk just a little bit in more detail about the justification of this mandate to purchase health insurance, the requirement that every individual in the United States be the recipient of a specifically defined policy by the U.S. Government.

The rationale the government has provided is that if we do not do this, then free riders or people who do not have insurance but might get sick will end up shifting all of the burden of their care onto the rest of us, and therefore the government needs to regulate that by forcing everybody to buy insurance. On March 20 the Journal published a piece by Douglas Holtz-Eakin and Vernon Smith, a former CBO Director and an economics professor, respectively, which I think really debunks this argument on the merits. It explains the real reason this mandate, as well as a dramatic expansion of Medicaid, is unconstitutional. I just wanted to highlight the points they make.

First, Holtz-Eakin and Smith address this individual mandate question. States, of course, have general police power to regulate the conduct of their citizens, but Federal power, by contrast, is very limited over individuals.

The authors make the important point that heath care policy has traditionally been a State function. Health

care needs relate to individuals and vary from person to person and region to region. As a policy matter, States have a better understanding of what kind of improvements to health care access are needed.

Here is what they wrote:

The administration's attempt to fashion a singular, universal solution is not necessary to deal with the variegated issues arising in these markets. States have taken the lead in past reform efforts. They should be an integral part of improving the functioning of health-care and health-insurance markets.

If the States have the legal power to address health issues and are better equipped to do so, then where does the justification for Federal jurisdiction come from? The authors note that the administration's argument is that the Federal Government mandate is needed to address the cost-shifting, the thing I talked about before. But they note that this is a red herring. ''In reality,'' the authors write, ''the mandate has almost nothing to do with cost-shifting.'' That is because, in actuality, the young and the healthy—the people who are not buying health insurance—aren't imposing much of a burden on the system because they do not get sick that often. They do not need as much insurance because they do not need as much health care. The authors say that ''the insurance mandate cannot reasonably be justified on the ground that it remedies costs imposed on the system by the voluntarily uninsured.'' In other words, as I said, there is not that much free-riding going on.

The authors conclude that the real purpose of the mandate is not to decrease the costs of uncompensated care, it is meant to force the young and the healthy to buy health insurance at rates far above the amount and scope of coverage they actually need because they are generally healthy individuals. But this extra money will help fund health insurance companies and therefore offset the huge increased costs imposed upon them by ObamaCare's many new regulations. This is the real reason for the individual mandate. In fact, as an amicus brief by over 100 economists points out, ''The [Affordable Care] Act is projected to impose total net costs of $360 billion on health insurance companies from 2012 to 2021.'' With the mandates, however, ''insurance companies can be expected to essentially break even.'' This is no coincidence.

If this is the real justification for the mandate to purchase health care, I submit it should have been done through an enumerated power—perhaps under the tax power of the Federal Government, which is at least one of the powers the Constitution explicitly provides.

In any event, this individual mandate cannot be justified to regulate interstate commerce. The supporters of the mandate have therefore introduced a second argument. They say health care is just different from all other commerce. It is bigger. Everybody has to have health care—as if they did not have to have food on the table or shelter over their head or clothes on their back and so on. In any event, they say health care is different and somehow this difference gives Congress the right to force people to buy government-mandated health insurance under its power to regulate interstate commerce. But the argument that ''this particular market is just different'' is beside the point even if it were true because it does not articulate a constitutional limitation that is judicially enforceable.

The question before the Court is whether there is any limit to Congress's power to regulate commerce. Obviously, the Framers would never have countenanced a Federal requirement to purchase a product so that the government could then regulate it. So what limit on constitutional power is suggested by the health care market? None. That is precisely the point. The government cannot draw a line, and, as a result, it would have to argue that there is no limit to its powers, and that, of course, would run counter to the reason the Framers put limitations into the Constitution.

The individual mandate is not the only provision in ObamaCare that is constitutionally impermissible. The Medicaid expansion is also violative. While Congress has well-established power to use its purse strings to encourage the States to adopt certain Federal policies, it cannot force them or compel them to do so. ObamaCare's Medicaid expansion essentially coerces the States into complying with new Medicaid policies.

This occurs in two different ways. First, if a State does not comply with the ObamaCare eligibility expansion, it would lose all of its Federal Medicaid funds—even for patient populations that the State had already covered long before ObamaCare was passed. Few if any States would be able to continue their existing Medicaid Programs if they lost all of this Federal funding.

An amicus brief signed by over 100 economists examined Medicaid data to determine the economic impact of States losing all of their Medicaid funds, and it found that if States were forced to absorb Federal Medicaid expenditures into their own State budgets, ''the State's total budgetary expenditures would jump by 22.5 percent.'' In other words, there is no real choice. The options for States are to do as the Federal Government says or leave Medicaid, which by now is so engrained in the care for the indigent that unwinding it, in effect, disentangling it from existing Federal-State relationships, would be virtually impossible and would obviously jeopardize care for the population without other health coverage. This is coercion, plain and simple. It is unconstitutional.

Second, ObamaCare expands Medicaid eligibility to everyone under 138 percent of the Federal poverty level. For individuals who make less than 138 percent of the poverty level, ObamaCare provides no means for complying with the individual mandate other than enrolling in Medicaid. In their brief to the Supreme Court, the States suing over the Medicaid expansion said it best:

When Congress mandates that Medicaid-eligible individuals maintain insurance, but provides no alternative means for them to obtain it, it is impossible to label the States' participation in Medicaid voluntary.

If it is the only way someone can get it, it is not voluntary.

Well, ObamaCare, as a whole, cannot survive without these unconstitutional provisions, and these are the reasons I believe it will and can be struck down as unconstitutional.

MISSILE DEFENSE

Mr. KYL. Mr. President, the last subject I would like to comment on is an unrelated subject. It has to do with comments the President was overheard making in a meeting he was holding with Russian President Dmitri Medvedev at the Nuclear Security Summit in South Korea. He had a hot mike which captured comments he was making privately to President Medvedev. He requested a little space, as he put it, in negotiations over missile defense issues until after the election when he said he would have more flexibility.

Well, obviously, this presents a problem that is going to have to be discussed with the Congress because if the President is, in effect, saying he would like to make a deal to limit U.S. missile defenses now, but he would be accountable to the American public if they became aware of it before his reelection bid, it would be very difficult for him to make the kind of concessions that President Medvedev wants. But if the Russian President would just wait until after the next election, then the President will have more flexibility to work with the Russians on what they want.

Well, President Medvedev very helpfully said: I will pass this on to Vladimir.

Here are a few things we know: We know President Obama canceled plans to station antiballistic defense systems in Poland and the Czech Republic. We know the President supported language in a new START treaty to link missile defense to nuclear reduction. We know the administration is sharing information with Russia, including plans to deploy missile defenses in Europe. We know the President has significantly reduced funding for and curtailed development of the U.S. national missile defense system, undermining our ability to effectively intercept long-range ballistic missiles, and we know the President has doubled down on efforts to reduce our nuclear arsenal while failing to honor his promises to modernize the aging nuclear weapon complex.

What we don't know is what President Obama has in mind for working