



Constitutionality of Individual Mandate Will Be Close Call

April 20, 2010

(By Ronald L. Trowbridge, Ph.D.) -- According to White House Press Secretary Robert Gibbs, its legal counsel opined that the new federal mandate requiring individuals to purchase health insurance is constitutional under the Commerce Clause. True or wishful thinking?

In either case, the mandate is unprecedented in the history of U. S. jurisprudence. The nub of the controversy is this: Will the Supreme Court, citing the Commerce Clause, permit Congress to regulate inactivity – that is, the absence of commerce – by forcing citizens to buy a certain private sector service or product?

The court has taken polar positions on the Commerce Clause. In *Gonzalez v. Raich* (2005), it ruled that the Commerce Clause can be used to regulate home-grown marijuana even if only for personal use. But in *U. S. v. Lopez* (1995), it ruled that the Commerce Clause does not authorize federal law banning guns in local school districts.

The constitutionality of the mandate will also be tested under the 16th Amendment, which grants Congress the broad "power to lay and collect taxes on incomes." But the individual mandate is not a tax; it is a premium to an insurance company or a fine, though the effort semantically will be to define the fine as a tax.

Some opposed to the individual mandate will argue that the 16th Amendment, if used to permit the mandate, discriminates against citizens who choose not to have health insurance. But the Amendment already discriminates broadly, as a graduated income tax is discriminatory. Mortgage deductions or deductions for children are discriminatory. We see a host of other discriminatory taxations whenever we file our yearly taxes.

Defenders of the individual mandate will argue that there are well established precedents for government coercion. Few people these days think that coerced social security payments or withheld Medicare premiums are unconstitutional. Car insurance is often cited, though that analogy fails: a liability insurance mandated only if you drive on roads is quite different from an insurance mandated simply for living and breathing on American soil.

There is another unknown that could well enter into the matter of constitutionality of the individual mandate: the Supreme Court may elect not to meddle – on such an enormous, radical scale – into the domains of the presidency and Congress. *Marbury v. Madison* established the Court's power to rule an act of Congress unconstitutional, but the Court on the individual mandate might instead opt for recommending legislative relief.

Such a deferral could happen in this case because if the individual mandate is found unconstitutional, the bill that passed the House and Senate, signed by the President, will likely collapse from its own weight. The insurance risk pool would be decimated by some 12 million people not putting multiple billions of dollars into the pool. Imagine 12 million people not contributing, say, \$5,000 per policy premium to the risk pool; such would total a loss of \$60 billion per year. Insurance rates on the remaining payers would have to be raised to staggering levels.

So how will the Supreme Court rule? Judicial history argues that the Court will find the individual mandate unconstitutional for two seminal reasons. First, the court has never in its history expanded the Commerce Clause to regulate the absence of commerce and to require purchase of a private sector product. And second, the court has never defined a private-sector insurance premium or resulting fine for lack of premium payments as a tax; such a premium or fine therefore does not fall under the jurisdiction of the 16th Amendment.

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