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PPACA in the Federal Courts: Constitutional Within the Commerce Clause?

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Several lawsuits have challenged the constitutionality of the Patient Protection and Affordable Care Act of 2010 ("PPACA"). Most of them focus on the "requirement" in PPACA Section 1501 and new Chapter 48, Section 5000A of the Internal Revenue Code. This "requirement," now known as the "Individual Mandate" (the "Mandate"), occupies 6 of the 900 pages of PPACA's final version. The Mandate will require most everyone to buy "minimum essential coverage" health insurance by 2014 or incur a monetary penalty to be paid with one's Federal income tax return. Several groups are exempt from the Mandate, some based on religious practices (including those who oppose health insurance in principle), and people in prison. Other exceptions include persons "not lawfully present" in the U.S., an ironic collection of overseas U.S. nationals and aliens present but not "lawfully present" in the U.S.

The Federal courts, ultimately the justices of the Supreme Court of the United States (the "Supreme Court" or "the Court"), will be asked to determine whether PPACA passes constitutional scrutiny under the Constitution of the United States (the "Constitution"). They will do so under the doctrine of "judicial review," established by the Court itself in the 1803 case of *Marbury vs. Madison*. The fate or future of PPACA will be shaped by debates and votes among these Federal judges, with ultimate decisions by the Court whether it accepts an appeal or allows lower court rulings to stand. Supreme Court watchers already are studying closely the writings and speeches of Justice Anthony Kennedy, hoping to discern where his potential swing vote might turn a 5-4 decision.

Federal courts are grouped into twelve regional "Circuits" (see map attached). The courts within each Circuit consist of Federal trial courts, known as U.S. District Courts, and a Federal appellate court, a U.S. Court of Appeal. In general, these trial and appellate courts rule on matters of Federal law prior to review by the Supreme Court. Several Circuit Courts of Appeal have considered PPACA litigation. This white paper sketches four cases in three Circuits where Federal judges have ruled on the Mandate and/or PPACA. On April 25, the Supreme Court denied a petition to short-cut one of the appeals directly to that Court, so the process will wend its way through the Circuit Courts of Appeal over the next several months. In this classic American constitutional drama, one can follow the interplay of policy, economics, law, geography and politics (note, e.g., the presidential

appointments of the judges and their subsequent confirmation by the U.S. Senate). After the cases, we summarize the arguments over the "Commerce Clause" of the Constitution at the heart of this constitutional debate.

Federal Cases Ruling in *Favor* of the Mandate and/or PPACA

Thomas More Law Center, et al. v. Obama

- Decision: October 2010 – Judge George C. Steeh, Eastern District Michigan (President Clinton appointee), dismissed constitutional challenge.
- Appeal: 6th Circuit Court of Appeals (Cincinnati) has set an expedited schedule; oral arguments scheduled for June 1, 2011.

Liberty University, Inc., et al. v. Geithner, et al.

- Decision: November 2010 – Judge Norman Moon, Western District Virginia (President Clinton appointee), dismissed constitutional challenge.
- Appeal: 4th Circuit Court of Appeals (Richmond) heard oral arguments on May 10, 2011, in connection with oral arguments in *Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius* (see below).

Federal Cases Ruling *Against* the Mandate and/or PPACA

Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius

- Decision: December 2010 – Judge Henry F. Hudson, Eastern District Virginia (President George W. Bush appointee), upheld Virginia Attorney General Ken Cuccinelli's lawsuit, holding that the Mandate was unconstitutional.
- Appeal: 4th Circuit Court of Appeals (Richmond) heard oral arguments on May 10, 2011, in connection with the *Liberty University* case (see above).

State of Florida, et al. v. U.S. Department of Health and Human Services, et al. (The 26-State challenge)

- Decision: January 2011 – Judge Roger Vinson, Northern District Florida (President Reagan appointee), sustained challenge filed by Florida and 25 other States, holding that the Mandate was unconstitutional and that as a result, none of PPACA could survive.
- Development: March 3, 2011 – Judge Vinson ruled that States must continue implementing PPACA while the case continues, conditioned upon an expedited appeal.
- Appeal: 11th Circuit Court of Appeals (Atlanta) will hear oral arguments on June 8, 2011.

General Principles of the Commerce Clause Challenge

Several issues affect the PPACA constitutionality debate, such as States' rights under the Tenth Amendment to the Constitution and whether the Mandate is a penalty or a tax under the power of the U.S. Congress (the "Congress") to raise revenue. But the core battle centers on Article 1, Section 8 of the Constitution, the powers and limitations of Congress under "the Commerce Clause." Under the Commerce Clause, Congress regulates commerce among the States. The Supreme Court has established a three-pronged test to decide whether a law complies with the Commerce Clause. Congress may regulate:

- the channels of interstate commerce;

- the instrumentalities of interstate commerce, or persons or things in interstate commerce; and
- activities that substantially affect interstate commerce.

The Mandate's constitutionality under the Commerce Clause depends on the third prong. The Supreme Court has extended this category to local activities that—taken in the aggregate—substantially affect interstate commerce, including local, non-commercial activities that are an essential part of a broader statutory scheme that permissibly regulates commerce. Even a local, non-economic activity may be an essential part of a larger regulation of economic activity if the broader regulatory scheme could be undercut unless the intrastate activity were regulated. In *Gonzales v. Raich* (2005), the Court ruled that the Commerce Clause enabled Congress to control an individual's private use of home grown marijuana permitted under a California medical marijuana law.

The Supreme Court has given Congress much deference under the Commerce Clause over the last seventy years. A rational basis must exist to conclude that a local activity substantially affects interstate commerce in the aggregate. But Congress's rational basis for so concluding cannot be, in Supreme Court constitutional rhetoric "overly attenuated," or stretched too far. In *U.S. v. Lopez* (1995), the Court addressed the conviction of a 12th Grade student for carrying a concealed handgun into a school in violation of the Gun Free School Zone Act of 1990. The legislation made it a federal offense for any individual knowingly to possess a firearm at a place that the individual knew or had reasonable cause to believe is a school zone. Striking down the Act, the Court held that the mere possession of a gun near a school was too remotely connected to interstate commerce. In a split 5-4 decision (the majority including Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas), the Court found that while Congress holds broad lawmaking authority under the Commerce Clause, that power has limits, and those do not extend so far from "Commerce" as to authorize the regulation of the carrying of handguns when there was no evidence that carrying them affected the economy on a larger scale. How far is "too far" will be tested in the PPACA cases. Congressional findings as to an activity's impact on interstate commerce must be considered, but are not necessarily dispositive.

Arguments in *Favor* of the Mandate Under the Commerce Clause

The arguments over the next few months may evolve, but here are summaries of the basic ones used to support the constitutionality of the Mandate.

A. Deciding to pay out-of-pocket for health care services instead of through the purchase of health insurance is an activity, as both sides of the decision to purchase insurance are "activities." Two characteristics unique to this market guarantee that the vast majority (if not all) of individuals will receive medical care at some point.

   - First, individuals subject to the Mandate cannot stay completely outside of the interstate health care market unless they oppose medical services on religious grounds.
   - Second, providers must deliver basic medical services under Federal law, regardless of a patient's ability to pay. Further, nonprofit hospitals must provide free or discounted services to community members who cannot pay.
   - Because individuals will participate in the health care market at some point, they are not "inactive" or "passive" in choosing not to buy health insurance. Rather, they are actively making other decisions (i.e., what

to buy instead) and deciding how health care services will be paid for and by whom (i.e., by relying on their own resources or on Federal law that will require providers to care for them).

B. The decision whether to purchase insurance or to attempt to pay for medical services out-of-pocket is economic.

"Economics" includes the consumption of commodities, and Congress may regulate insurance markets under the Commerce Clause because insurance policies are "commodities" in the flow of interstate commerce.

There is a rational basis to conclude that, in the aggregate, decisions not to obtain health insurance and to pay out-of-pocket for health care substantially affect the interstate health insurance market. Uninsured Americans receive services that they cannot afford, often ending in bankruptcy.

- Decisions to forego insurance shift the cost of uncompensated care—$43 billion in 2008—to others in the market (including providers and insured Americans), Federal and State governments, and taxpayers.
- Because of this cost-shifting, individual decisions to go without insurance drive up the cost of health insurance in the aggregate. Congressional findings recited in PPACA note that the cost-shifting increases family premiums by more than $1,000 annually.
- The effect by uninsured Americans upon insurance premiums is direct, not attenuated, and Congress addressed the economic effect of such decisions through PPACA and the Mandate.
- The Supreme Court consistently has rejected claims that individuals place themselves outside of the Commerce Clause's reach by choosing not to engage in commerce. Such individuals still participate in the health services market.

C. The Individual Mandate—by addressing the cost-shifting of uncompensated care—is an essential piece of PPACA, which regulates a broader interstate market. It is rational to believe that the failure to regulate the uninsured will damage PPACA's larger regulatory approach to the interstate market.

- PPACA will enable uninsured individuals to obtain insurance at the same cost as everyone else, even with a pre-existing condition.
- Without the Mandate, individuals would have an incentive to wait to purchase insurance until they need care since insurance will always be available.
- As a result, the most expensive people would be in the insurance system and the least expensive would be outside, worsening the cost-shifting problem and increasing insurance premiums.
- Many of PPACA's other reforms to increase the availability and affordability of health insurance rely on the Mandate's impact on premiums.

D. Because, under the Commerce Clause, Congress can regulate the class of individuals who participate in the health care market, it does not matter whether certain individuals could pay out-of-pocket for care they receive, or that they claim that they will *never* participate in the market, since:

- the vast majority of individuals enter the health care market at some point; and

- even assuming that certain people actually refuse medical care throughout their lives, Congress can regulate their individual activity because the practice of the broader class of uninsured individuals substantially affects national markets.

Arguments *Against* the Mandate Under the Commerce Clause

Despite the aspirational goals of PPACA and its programs, these arguments summarize the constitutional opposition to PPACA via the Mandate.

A. The Commerce Clause requires the existence of an *activity*. To date, every Commerce Clause case has included a clear activity—none have merely involved a "passive inactivity."

- Supreme Court precedent provides that Congress can regulate three broad categories of activity, and the category in question here allows Congress to regulate "those activities having a substantial relation to interstate commerce."
- Permitting Congress to regulate inactivity would break new legal ground by expanding the Commerce Clause to unprecedented areas.
- Only the Court can redefine or expand its interpretation of the Commerce Clause.

B. The failure to purchase health insurance is not an activity:

- Section 1501 of PPACA penalizes a person who "fails" to act pursuant to the Mandate—(i.e., does not engage in the required activity.)
- Congressional Budget Office confirmed the lack of activity in the Mandate, reporting that it "could be imposed on some individuals who engage in virtually no economic activity whatsoever."
- The health care market is not the only market where (a) no individual can opt-out, and (a) there is cost-sharing to cover non-paying individuals.
- Individuals cannot, for example, opt-out of food or transportation markets. If the Mandate stands, could Congress use the Commerce Clause to require people to purchase other products or services that affect interstate commerce?
- The argument that the uninsured have a substantial effect on health care by shifting costs exemplifies "inference upon inference," which the Supreme Court has rejected. Cost-shifting would occur only if all of these exist for uninsured persons: (1) sick or injured, (2) uninsured, (3) seek medical care, (4) cannot pay for care, and (5) unwilling to work with provider or get assistance from family/friends/charities.
- Failure to purchase health insurance cannot be redefined as an economic activity by assuming the individual is making a conscious decision to use a different or no method to pay for care. Such a rationale would end all limits to Congressional power because all decisions have some economic impact.

C. The Mandate does not regulate an activity and lies outside of Congress's power; so the Necessary and Proper Clause ("NPC") is irrelevant. The NPC's grant of broad authority to Congress does not authorize laws that unconstitutionally expand its stated powers. Rather, the NPC exists only to further Congress's permitted powers.

Impact of PPACA Federal Court Decisions

If the courts strike down the Mandate, it may invalidate the entire law, as PPACA contains no "severability clause." Whether to strike all or part of a law would involve a two-part test:

(1) Can the remaining provisions function independently in a manner consistent with the intent of Congress?

(2) Would Congress, when presented with a statute without the unconstitutional provision, have preferred no statute at all?

Judge Vinson in Florida v. U.S. Dept. of Health and Human Services, found that the Mandate was not severable because it failed this test.

Even if the Court strikes only the Mandate and not all of PPACA, most observers including PPACA supporters, doubt the rest of it could stand as enacted, as many provisions are to be funded by premiums that the Mandate would generate.

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United States Federal Court Appellate Circuits