Constitutionality of the Individual Mandate to Obtain Health Insurance

Kenneth G. Schwarz  03-23-2011

On March 23, 2010, President Barack Obama signed into law Public Law 111-148, titled The Patient Protection and Affordable Care Act. In order to enlarge the pool of insured persons to contain a sufficient number of younger, healthy people, the act, subject to exceptions, imposed the legal obligation upon most Americans to procure health insurance for themselves and their dependents that provides the minimal levels of coverage specified in the act. In popular parlance, the legal obligation to obtain health insurance is referred to as the individual mandate, and has led to numerous lawsuits and decisions that conflict with one another. Those cases and the constitutional arguments likely to be used when the question finally reaches the U.S. Supreme Court will be discussed in this article.

Set forth in §1501 of the act, the mandate is preceded by a series of congressional findings that serve as the constitutional basis for imposing an individual mandate. According to those findings, interstate commerce is implicated as follows: (1) the act regulates activity that is commercial and economic in nature; (2) national health spending is projected to increase from $250 trillion, or 17.6 percent of the economy, in 2009 to $470 trillion in 2019. Private health insurance spending pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce; (3) the act will add millions of new consumers to the health insurance market; (4) the individual mandate will strengthen the private employer-based health insurance system, which covers 176 million Americans; (5) the number of personal bankruptcies caused by unpaid medical bills will be greatly reduced; (6) the federal government has a significant role in regulating health insurance which is in interstate commerce; (7) if there were no requirement, many individuals would wait to purchase health insurance until they needed care, and (8) with a significant increase in health insurance coverage, administrative costs will be reduced, thereby making health care more affordable.

To further enhance the constitutional legitimacy of the individual mandate, §1501 cites United States v. South-Eastern Underwriters1 where the Supreme Court held that insurance is interstate commerce subject to federal regulation. Therefore, because the act regulates insurance, which it unquestionably does, and because the individual mandate is an essential part of the act, it is a proper exercise of
congressional power, or so Congress stated.

Firestorm of Controversy

Anyone with the slightest interest in politics knows that the act, particularly the individual mandate, has generated a firestorm of controversy. Those opposed to the mandate argue that the act will deprive them of their individual liberties. They argue that the founding fathers never intended to allow Congress, acting under the Commerce Clause, to regulate what people do not do in addition to what they do. They argue that their personal decision to not purchase health insurance does not constitute economic "activity," which they claim is an essential prerequisite to regulation under the Commerce Clause. They argue that their unwillingness to purchase health insurance is economic inactivity, something the U.S. Supreme Court has never held could be regulated under the Commerce Clause. Thus far, two courts have agreed with the foregoing.  

Its proponents view the individual mandate from a different perspective. They contend that the mandate should be viewed as part of the overall legislative enactment, which clearly involves interstate commerce. They argue that without the individual mandate, other parts of the act would not be possible. For example, unless the pool of insured citizens is enlarged to include healthy people, it will not be possible to require health insurers to insure persons with pre-existing medical conditions, who by definition will require greater medical care than young healthy people.

They also argue that every person, by virtue of their human nature, is part of the universal class of people who will someday require health care. Even the most adamant opponent of the individual mandate does not know when he or she will require such care. A 20-year-old person might be involved in a serious automobile accident, which will require life-saving medical treatment in a hospital emergency room. If that person does not have health insurance at the time of such treatment, and does not have the economic means to pay for such treatment, many hospitals will nevertheless provide medical treatment and then pass along the costs to the rest of us in the form of increased medical costs.

Because it is hoped that the act will result in a decrease of medical expenses, proponents of the individual mandate have argued that, far from constituting economic inactivity, the failure to purchase health insurance constitutes economic activity because the failure to have health insurance will increase the medical costs of all citizens. The proponents argue that Congress was empowered to adopt the individual mandate, not only under the Commerce Clause but also under the Necessary and Proper Clause of the U.S. Constitution. Thus far, three courts have agreed with the arguments made by the proponents of the individual mandate.  

Court Rulings

Mead v. Holder, 2011 U.S. Dist. LEXIS 18592 (D. D.C.), decided on Feb. 22, 2011, is the most recent case to uphold the constitutionality of the act. In Mead, the D.C. federal court recognized that the mandate is not a standalone reform, but is an essential element of a larger regulatory scheme. In finding that the mandate did implicate economic activity, the court also found that there was a rational basis for concluding that decisions not to purchase health insurance, when taken in the aggregate,
substantially affect the national health care. Finally, the court concluded that the individual mandate is an appropriate means which is rationally related to the achievement of Congress' larger goal of reforming the national health insurance system.

While three courts have ruled to uphold the constitutionality of the individual mandate and two have not, the court in *State of Florida v. United States Department of Health and Human Services*, supra, went further than any court has gone. One of the courts invalidating the individual mandate has thus far refused to invalidate the entire act. However, the court in the Florida case took it a step further and invalidated the entire act, not because of the absence of a severability clause in the act, but because "the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit. The individual mandate cannot be severed." 6

Hence, while the two courts that upheld the constitutionality of the individual mandate did so, in part, because it was the keystone of the act, the Florida court invalidated the entire act because the individual mandate was an essential element of the act. Hence, we have the bizarre spectacle of courts reaching results that are polar opposites to one another while citing essentially the same reason, namely, that the individual mandate is the keystone of the act.

In *State of Florida*, the court held that the Necessary and Proper Clause cannot be utilized to pass laws for the accomplishment of objects that are not within Congress' enumerated powers. Viewing the individual mandate as if it were a free-standing law unrelated to the overall act of which it was a part, the court held that "the individual mandate is neither within the letter nor the spirit of the Constitution." 7 When the Supreme Court reviews the legality of the act, this may be the pivotal issue. If Congress had the power to adopt the act without an individual mandate, could Congress, relying on the Necessary and Proper Clause, adopt an individual mandate in furtherance of the act?

It should be noted that the two courts that invalidated the individual mandate did so for no reason other than the belief that Congress lacked the power to enact such mandate. The courts did not invalidate the mandate because they felt it was an unconstitutional taking, or for any other constitutional reason save the absence of power. Hence, the question will be whether the individual mandate, because it is a critical component of the act, was within the power of Congress to adopt.

This is far from being the first time that parties have disagreed on the reach of power that Congress can exercise. Early in our country's history, George Washington asked Thomas Jefferson to opine on the legality of establishing a national bank. Because there is nothing in the Constitution that empowers Congress to establish a national bank, Thomas Jefferson concluded that Congress lacked such power. President Washington then asked Alexander Hamilton to comment on whether Congress could lawfully do so. In a lengthy opinion, 8 Mr. Hamilton opined that if Congress was seeking to attain a legitimate purpose that was constitutionally authorized, it also had the power to adopt measures that have a natural relation to that legitimate purpose.

Hence, while the Constitution does not empower Congress to establish a national bank, it does empower it to regulate commerce. "The institution of a bank has also a natural relation to the regulation of trade between the States, in so far as it is conducive to the creation of a convenient medium of exchange between them, and to the keeping up a full circulation, by preventing the frequent
displacement of the metals in reciprocal remittances. Money is the very hinge on which commerce turns." Hence, Mr. Hamilton opined that Congress had the power to establish a national bank.

Looking Ahead

Whether or not the Supreme Court will adopt Alexander Hamilton’s view and hold that the individual mandate is proper because Congress has the power to regulate insurance and because the act constitutes the regulation of insurance remains to be seen. In deciding the issues, the Supreme Court will not be required to determine whether the act, taken in the aggregate, substantially affects interstate commerce in fact, but only whether a "rational basis" exists for so concluding.\(^9\)

Proponents of the act will argue that due respect for the decisions of a coordinate branch of government demands that the act be invalidated only upon a plain showing that Congress has exceeded its constitutional bounds.\(^10\) Opponents of the act will argue that in determining the power of Congress, "the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."\(^11\)

Given the wildly divergent views on the legitimacy of the individual mandate, and the politically charged commentary that has accompanied the debate, we are likely to see a decision from the Supreme Court that will reverberate for years to come.

**Kenneth G. Schwarz** is of counsel to Cozen O’Connor in New York. He formerly served on the staff of the counsel to the Federal Communications Commission.

Endnotes:

1. 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).

2. Article 1, Section 8 of the U.S. Constitution authorizes Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."


4. Article 1, Section 8 of the U.S. Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

6. Id. at *135-136.


9. Gonzales v. Raich, 545 U.S. 1 at 22, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).
