

# The News Journal

March 31, 2012 Saturday

## Invalid individual mandate will doom health care overhaul

By ROBERT PRYBUTOK

The Supreme Court heard oral arguments this week over the constitutionality of the Patient Protection and Affordable Care Act. This is President Barack Obama's centerpiece legislation of his political career and in many ways defines his presidency.

This court battle has nothing to do with health care and everything to do with freedom and liberty. In order to provide health care to less than 10 percent of the population, our elected officials have sacrificed the entire health care system of the United States and will have impacted the lives of all of its citizens. The significant impact of this legislation is the reason the Supreme Court has fast-tracked this and allowed six hours of oral arguments.

This legislation has a messy history and too many unanswered questions. Most citizens have the impression our legislators did not write the bill, did not read the bill and do not understand the bill. There is unprecedented opposition to this legislation because most Americans recognize our health care system is in jeopardy and the costs for the act will be unsustainable.

There is universal agreement our health care system needs repair, but the act appears to cause more problems than it solves.

Four major issues were addressed during the oral arguments. The first day of argument focused on the application of the individual mandate and the financial penalty to those choosing not to purchase health care. The government attempted to color this as a tax in Monday's arguments, because if it were truly a tax, the suit would not be heard, and the suit could not be brought until the tax was incurred and paid. This was the government attempting to have it both ways, since nowhere in the legislation is the penalty referred to as a tax. It is obvious the court views this as a penalty, and the suit will continue to a judgment.

The second day focused on the individual mandate. The individual mandate is presented as the major constitutional challenge to the act. Lawyers argued that the government has no constitutionally supported right to demand all citizens purchase a product or face a penalty. There were several very strong reactions from the justices. Anthony Kennedy, considered the swing vote, questioned the validity of the governments attempting to create commerce so it can then regulate that commerce. There was also the discussion of the mandate being necessary to the bill but not constitutionally proper (the necessary and proper clause of the Constitution). A major focus was the lack of a limiting principle in the legislation as to the use and application of the commerce clause.

In the Caesar Rodney Institute's amicus curiae to the 11th District Court of Appeals, the D.C. District Court of Appeals and the Supreme Court, the institute argued that the act lacked a jurisdictional element or limiting principle in the application of the commerce clause regarding the imposition of the individual mandate. This argument had not been presented by other amici and was recognized by both courts, although the D.C. Circuit Court upheld the act and punted this question to the Supreme Court. It was apparent the Supreme Court recognized this issue.

Our Founding Fathers created a federalist system of government that gave the U.S. government limited, enumerated powers, and reserved the remaining powers to the states and individuals to preserve our freedoms. The act guts the federalist structure by using the federal commerce power to impose, for the first time in U.S. history, a requirement that all Americans purchase a product simply because they are living. If this legislation stands, in the future, the federal government could compel Americans to buy other private products or otherwise intrude more deeply into our personal lives, all under the pretext of the interstate commerce power. This is due to the lack of a limiting principle.

The third day of oral arguments focused on severability and Medicaid. The court appeared to lean toward the concept that if the individual mandate falls, the entire bill should be struck down. There is agreement that the individual mandate is a foundational element of the act, and if removed, the bill cannot function as intended, would be cost-prohibitive and economically disastrous to health insurance carriers. The more conservative justices appeared to grasp and be sympathetic to the political and economic realities of the situation.

At the fourth annual Caesar Rodney dinner, keynote speaker Ilya Shapiro, a constitutional scholar of the **Cato Institute**, predicted the Supreme Court will vote 5 to 4 against the individual mandate, with the swing vote being cast by Justice Kennedy. What is less clear is if the entire law will be struck down by the court. After listening to the oral arguments, I am optimistic we may have the opportunity to start over.

If the act is found to be constitutional and the law stands, many businesses will drop health care and accept the penalty since it will be less expensive than the current cost to most businesses for providing health care. This will place even more economic stress on the health care system and insure the United States ultimately ends up with a single payer health care system administered by the federal government.

Robert Prybutok is a director of the Caesar Rodney Institute and president and CEO of Polymer Technologies Inc. in Newark.