

REAL CLEAR POLITICS

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The Supreme ObamaCare Question

By [Michael Tanner](#)

Next week, the Supreme Court will devote six hours over three days to hearing challenges to the Patient Protection and Affordable Care Act, aka ObamaCare.

The last time the court spent this much time hearing arguments in a case was in 1966, when it devoted six hours to the case establishing a defendant's Miranda rights and seven hours to the case that upheld the Voting Rights Act. This decision is likely to be just as momentous.

That's because this case isn't really about health-care reform. Rather, it's about government power and the fundamental relationship between government and the people.

The court will hear four separate but related arguments, but all the issues boil down to a simple but important question: Do we have a government of limited, enumerated powers or a government of unbridled power, with the authority to control and direct every aspect of our lives?

In defending the health-care law, the Obama administration relies on two constitutional provisions to justify its claim of federal power. The first is the Commerce Clause, which grants Congress the power to "to regulate commerce . . . among the several states." This is supposed to justify ObamaCare's mandating that each of us buy insurance (the "individual mandate").

How does a decision not to buy something constitute commerce?

Well, since the New Deal era, the courts have expanded the definition of commerce to include any "activity" that has a "substantial economic effect on interstate commerce." Thus the high court has held that such things as growing wheat to feed to your cattle (*Wickard v. Philburn*) or distributing medical marijuana (*Gonzalez v. Raich*) can be regulated as interstate commerce.

But both growing wheat and giving away pot involve doing something. The Obama administration is seeking to extend Congress's power to inactivity. Congress would not only have the power to regulate how you do something or to prohibit you from doing it, Congress now could require you to do something.

In a bit of Orwellian logic, the administration argues that by not doing something, you actually are doing something.

As a lower-court judge wrote in upholding the mandate, choosing not to do something is "mental activity," and is therefore subject to regulation. Thus, government essentially is asserting its authority over every thought in your head.

The crucial concern here is what lawyers call a "limiting principle." If the court upholds the government's power to force you to buy health insurance, is there any limit to this power? Is there anything the government can't require you to do?

So far, the administration hasn't found anything that lies outside their reach.

Deputy Assistant Attorney General Beth Brinkmann, arguing this case before a lower court, was asked whether a federal law requiring Americans to eat broccoli would be constitutional.

"It depends," she replied, but said she could envision cases in which it would be. Likewise, she thought that a law requiring people to buy cars from General Motors to keep it in business might well be constitutional.

If the court buys into the administration's reasoning, we probably still wouldn't have to worry about the broccoli police anytime soon — but there would be little constitutional protection from Washington's regulation of anything you do . . . or don't do.

The administration also cites the Constitution's Necessary and Proper Clause, which grants Congress authority "To make all Laws which shall be necessary and proper for carrying into Execution [its constitutional powers]."

The argument here is that health care is an important problem facing this country, and the administration's preferred remedy for that problem can't be carried out without the individual mandate. The mandate, therefore, is a "necessary and proper" way to accomplish its larger goals.

Again, this would open the door to unlimited government power. If the government has the authority to enact any law it deems necessary to doing whatever it wants to do, the Constitution essentially becomes meaningless.

As the 11th Circuit Court wrote when it ruled that the mandate was unconstitutional, "We have not found any generally applicable, judicially enforceable limiting principle that would

permit us to uphold the mandate without obliterating the boundaries inherent in the system of enumerated congressional powers.”

That, and not a costly boondoggle of a health-care plan, is what’s really at stake next week.

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