A Primer on the Constitutionality of Health Reform

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The same day President Obama signed his health care bill, attorneys general in Virginia and Florida — the latter eventually joined by 19 other states — signed legal complaints challenging it. More than 20 lawsuits have been filed across the country, with serious lawyers, scholars, think tanks, and advocacy groups involved directly or as "friends of the court."

In recent months the federal courts in Virginia and Florida issued significant denials of the government's motions to dismiss — long, thorough rulings that affirmed the constitutional claims against Obamacare. The government prevailed in a Michigan district court's cursory opinion, in a case brought by the Thomas More Law Center.

The legal battle over Obamacare is only beginning, with appeals proceeding all over the country. These cases present the fundamental questions of where government gets its powers, and what the constitutional limits to those powers are.

The strongest constitutional criticism of the legislation is that the individual mandate to buy health insurance exceeds Congress's power to "regulate commerce ... among the several states." Never before has the federal government required every man, woman, and child to buy a particular good or service — or pay a civil penalty for declining to do so. Never before have courts had to consider such a breathtaking assertion of raw power under the Commerce Clause — not even during the height of the New Deal. The lawsuits thus allege that an individual's choice not to purchase health insurance is not an economic activity that Congress can regulate.

In 1942, the Supreme Court for the first time upheld the federal regulation of local economic activity — not just trade or exchange, as the traditional definition of "commerce" would have it. The Court ruled that Congress could stop a farmer from growing wheat for personal consumption because if he did so, he would not need to purchase it, which would depress aggregate prices.

The Court employed a similar analysis five years ago, when it held that the production of marijuana for personal use was an economic activity that Congress could regulate. Congress' power thus now extends to economic activities that substantially impact interstate commerce.

While the Court has rejected nearly all Commerce Clause challenges since the New Deal, two such lawsuits have been successful. In 1995, the Court struck down a law prohibiting the possession of guns near schools because it was not "part of a larger regulation of economic activity, in which the regulatory

scheme could be undercut unless the intrastate activities were regulated."

Similarly, in 2000, the Court struck down the Violence Against Women Act because the gender-motivated violence it regulated had only an "attenuated" economic effect. The Court therefore recognizes that some activities are outside the Commerce Clause's scope.

Although the individual mandate may seem like a small extension of federal power under existing doctrine, it is actually an unprecedented shift towards a government of unlimited powers. After all, even the outer limits of congressional power relate to activities, and always reflect regulations or proscriptions, never mandates. With the individual mandate, the government now argues that it can regulate citizens' inactivity — one's very existence becomes a regulatory trigger.

In defending the Obamacare lawsuits, the government contends that the decision not to purchase health insurance is, in fact, an economic activity that is properly within Congress's regulatory sphere. The decision not to participate in commerce in effect is commerce — an "Alice in Wonderland" word game that effectively destroys future limits on congressional power, in that every decision is an economic one.

With the Commerce Clause justification facing a credible challenge, the government — contradicting President Obama's assertions on national TV — began to argue that the fine levied on those who fail to comply with the individual mandate is a "tax" authorized under Congress's power to tax for the general welfare.

The individual mandate, however, is not justified anywhere in the bill by anything except the Commerce Clause — even though the legislation contains plenty of "taxes," such as on high-end insurance policies ("Cadillac plans") or on indoor tanning services. Congress specifically changed the term from "tax" to "penalty" in the last iteration of the bill and identified no revenue that would be raised from the "tax" — which, if it works as intended, would raise exactly zero revenue (because everyone would buy insurance).

As the Florida judge wrote, "the defendants are asking that I divine hidden and unstated intentions, and despite considerable evidence to the contrary, conclude that Congress really meant to say one thing when it expressly said something else."

Finally, even if "hidden and unstated intentions" carry the day and the individual mandate and its accompanying fine are deemed a tax, it would be an unconstitutional one. This is obviously not an income tax. Nor is it an excise tax — but even if it were it would fail because it is not "uniform." It could only possibly be a direct tax — but direct taxes must be "apportioned" by state and population, which is not how the mandate penalty is calculated. Moreover, Congress cannot use its taxing power to enforce a regulation of commerce that is not authorized elsewhere in the Constitution. Thus we are back to the Commerce Clause (and related Necessary and Proper Clause).

A date with the Supreme Court is inevitable — probably in 2012. In the face of such an unprecedented expansion of federal power, the high court cannot sit on the sidelines.

Ilya Shapiro *is a senior fellow in constitutional studies at the Cato Institute, where Trevor Burrus is a legal associate. Ilya Shapiro is co-signatory of the friend-of-the-court briefs that Cato has filed in the*

Virginia litigation discussed above.