Is Obamacare a Tax?

By Maureen Martin

The U.S. Department of Justice recently filed motions to dismiss the lawsuits brought by 18 states challenging the constitutionality of Obamacare, in what is becoming a legal battle of epic proportions with implications well beyond health care.

When Congress passed the bill, it made specific findings that health care and health insurance "substantially" affect interstate commerce, particularly the individual mandate in that it requires every American to buy private health insurance or be penalized by the Internal Revenue Service.

There are several grave problems with these findings. First, there cannot be any effect—substantial or otherwise—on interstate commerce because there is no interstate market for health insurance and health care. Under federal law, health insurance cannot be sold across state lines. And decisions about health care are made by individuals and their doctors, again wholly within a single state.

The Supreme Court has held an entirely intrastate activity by a single individual can be federally regulated if that activity, when combined with the same activity by many other individuals, would substantially affect interstate markets. But, as noted, there is no interstate market, so that argument is extremely weak—maybe even a loser.

Second, as Ilya Shapiro of the Cato Institute and Randy Barnett of Georgetown Law School have noted, even under the Supreme Court's most expansive readings of federal Commerce Clause powers, it has never held Congress can force individuals to engage in commerce by buying something. Nor has the Court ever held individuals can be penalized for failing to engage in commerce—in other words, for doing nothing.

Perhaps recognizing these fatal defects in the law, DOJ in its motions is now making two entirely new arguments. First, it writes Congress may enact laws "necessary and proper" to carry out its Commerce Clause powers. This argument, too, is a dud, because Congress has no Commerce Clause-related health care powers.

But DOJ also now argues the penalties on those who fail to buy health insurance are "taxes," which Congress has the power to impose to raise money to spend for the "general welfare" of the country.

This argument, as Shapiro notes, is "huge."

It has long been taught in high school civics classes that the federal government has only enumerated powers, as listed in the U.S. Constitution. That view goes back to a Supreme Court ruling in 1819.

These enumerated powers are typically those that individual states cannot exercise on their own: regulating commerce between the states, coining money, establishing post offices and post roads, establishing federal courts, fielding armies and navies, and so on. All other powers not listed are reserved to the states.

The Obama administration contends the clause enabling Congress to tax and spend for the "general welfare" gives Congress powers much more sweeping than the enumerated ones. That's sweeping power, all right. If this argument is sustained by the Supreme Court, Barnett writes, "Congress can assert any power it wills over individuals so long as it delegates enforcement of the penalty to the IRS." And as 17 of the state attorneys general argue in their joint complaint, "there will be virtually no sphere of private decision-making beyond the reach of federal power."

At her confirmation hearings, Supreme Court nominee Elena Kagan ducked the question of whether the federal government has the constitutional power to require all Americans to eat three fruits and three vegetables per day. If the Supreme Court buys the government's position on Obamacare, the answer will be "yes."

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