

## **THE AFFORDABLE HEALTH CARE AND PATIENT PROTECTION ACT GOES TO THE SUPREME COURT**

The Affordable Health Care and Patient Protection Act (termed ObamaCare by its detractors) was signed into law in March 2010. Like all efforts to reform the health care system, it has generated furious debate in the country, including spawning of the Tea Party Movement.

Whatever the outcome of its test of constitutionality before the Supreme Court during 2012, the U.S. health care system will continue to be one of the key policy challenges of the 21<sup>st</sup> century.

Because it makes up such a large portion of the economy and because its problems are so complex and intractable, it is important for Americans of all political persuasions to try to understand the problem better and work towards solutions that will not bankrupt our grandchildren.

This summary was prepared for a public policy retreat held in January 2012, prior to its challenge before the Supreme Court in the spring of 2012.

### **Why Did We Need Health Care Reform?**

- Health care is a \$2.5 trillion industry – almost 1/5 of national economy
- Health care costs: 5% of GDP in 1960, 10% in 85, 17% in 2009; projected 33% in 2040, 50% in 2080
- Other developed countries: 8 ½ % - 11% (less than half ours), but as good or better outcomes
- Most developed countries have government-run health care (“single payer”)
- Almost half of U.S. health care costs are already government-run: Medicare, Medicaid, Children's Health Insurance Program
- Medicare's reserve funds will be exhausted by 2017
- 46 m or 15% of population uninsured; many more underinsured. Their costs pass through to all as higher premiums
- 60% of US bankruptcies related to medical bills (including 60% “underinsured”)
- Causative factors for escalating health care costs in the U.S.:
  - aging population
  - obesity/lack of preventive care
  - primary care providers (too few) v. specialists (too many)
  - malpractice lawsuits/defensive medicine
  - inadequate computerization
  - too much money going to middle man (insurance companies and executives of large medical groups)
  - too little incentive for patients to choose health care based on cost-benefit analysis

- too much incentive for MDs to over-treat
- advertised drugs and treatments (putting pressure on both MDs and patients)
- development cost of new equipment and drugs
- use of emergency loopholes by uninsured
- the good old American belief that it's our God-given right to live forever
- We as a society pay for health care three ways: out of pocket, insurance premiums, taxes
- **Major problems to solve: (1) access, (2) quality, (3) cost**

### **The Health Care Act Becomes Law**

- Health care has always been a political hot potato—big, complex and with personal impact on individuals
- History of efforts at reform: Teddy Roosevelt, FDR's New Deal and "socialized medicine", insurance industry's creation as non-profit in WWII, Clinton's failed attempt at reform
- The Act was signed into law March 23, 2010
- Its impact is huge, comparable to Social Security (1935) and Medicare/Medicaid (1965)
- Goes into effect gradually between 2010 and 2018, with biggest changes in 2014
- The Act adds a lot of sick people to the system; unless we can also encourage people to enroll while still healthy, the system cannot succeed--thus, the Individual Mandate
- "Single payer" or "public option" (government-run, no middle man) would have lowered costs, but not politically viable
- Of the 3 goals (Access, Quality, Cost) the Act makes more progress with first two
- Covers 30 million more Americans
- Dept of HHS will have big role as it promulgates rules and regulations under the Act

### **Key Provisions**

- **Regulation of Insurance Companies**
  - No rejections based on pre-existing conditions
  - No lifetime or annual coverage caps
  - No cancellation if you get sick
  - Limitations of premium cost (by age and location)
  - Must spend a fixed percent of premium on medical care
  - Premium increases must be reasonable
  - No co-payments for preventive care
  - Dependents can stay on parents' insurance through age 26

- Must disclose details about their administrative and exec expenditures
- Enhanced fraud protection
- Individual Mandate
  - Virtually everybody must buy insurance
  - Necessary to avoid waiting to buy insurance “on way to hospital”
  - Exemptions for religion, tribes, hardship
  - Penalties for failure: Greater of \$695 or 2.5% of income by 2016 (after starting at 1%/\$95 then 2%/\$325), with cost-of-living increases
  - Children 50% of adult
  - Family max: Greater of \$2085 or 2.5%
- Employer Mandate
  - Applies to employers of 50 or more
  - Must cover at least 60% of costs
  - Penalties of \$2000/yr/employee
- Insurance Exchanges
  - State-based marketplaces to buy insurance
  - Must be up by 2014; Feds will do it if States don't
  - Choose bronze (60%), silver, gold, platinum (90%); catastrophic for a few
  - Subsidies to families above Medicaid and up to 400% of poverty level and to very small businesses
- Increased access to Medicaid
  - All families w/incomes up to 133% of poverty line (\$22,350 for family of 4), so it's families under about \$30,000/yr
  - Adds 9 million people
  - Fed Government funds 100% of added costs at first, then by 2020 the states pick of 10%; stays at that level
- Medicare changes
  - Expanded to small rural hospitals and clinics
  - Special monitoring of chronic illnesses
  - Cuts and costs added to Medicare Advantage
  - Closing of donut hole (Part D; between \$2800 and \$4500 drug costs per yr)
  - More preventive care
  - By 2015 value-based payments to providers
- New Government Programs, Boards and Research
  - 159 new boards; not popular with opponents of bureaucracy
  - Additional NIH support

- Patient-Centered Outcomes Research Institute
  - Preventive services task forces
  - New website with consumer insurance info
  - Centers for Medicare and Medicaid services oversees innovative changes
  - Independent Payment Advisory Board to reduce Medicare/Medicaid (eventually all health care costs)
  - Online quality rankings of providers
  - New preventive regulations, like caloric content disclosures at chain restaurants
- New Taxes
    - .9% additional tax on incomes over \$200,000 (families \$250,000)
    - 3.8% additional tax on lesser of amt of \$200,000 and net investment income
    - Excise taxes on pharmaceutical companies, medical device companies and insurance companies

The Law also contains a myriad of specific provisions covering everything from childhood obesity to nursing mothers.

### **Court Procedure and the Supreme Court Case**

Most cases that reach the Supreme Court began before a single judge in a local Federal District Court. That judge's ruling was then appealed to a Circuit Court of Appeal for the region, where the case was reviewed by a three-judge panel.

Although any party has the right to appeal a decision, the Supreme Court has discretion to grant writs of certiorari to hear only those cases they deem important. They decline most of the cases that seek appeal to the Supreme Court. They tend to take cases where key constitutional issues are at stake and particularly where appellate courts are split on the same issue.

The cases heard by the Supreme Court are inevitably close calls, where strong arguments can be made on both sides and where the law is not clear about what the outcome should be. Many of the cases they hear involve constitutional questions and, since the U.S. Constitution is so succinct, it is also ambiguous and open to interpretation. Therefore, the judges' political and judicial philosophies are more likely to come into play than in a lower court. This is why Supreme Court nominations are so hard fought before Congress.

Lawsuits challenging the Health Care Act were filed within hours of its signing. Of the 34 lawsuits filed, most were dismissed on procedural technicalities. However, three cases made their way to the appellate courts, of which two upheld the law and one found it unconstitutional, all in 2-to-1 splits among the judges.

The Supreme Court agreed to hear four issues, with an unprecedented 5 ½ hours of oral argument:

- Individual Mandate
- Severability
- Medicaid Expansion
- Ripeness

## **Issues**

### **Individual Mandate**

The Individual Mandate requires every person (with a few exceptions) to be covered by health insurance. The insurance may be governmental (e.g., Medicare/Medicaid), employer provided or privately purchased. If an individual is not covered by an employer or by a government plan, he must go out and purchase health insurance. There are subsidies to assist certain categories of people in this purchase. The essence of the constitutional challenge to the individual mandate is that it is not within the powers given to Congress to force individual citizens to purchase health insurance.

### ***States' Argument that the Individual Mandate is Unconstitutional***

- Commerce Clause gives Congress power “to regulate commerce among the several states.”
- It has been stretched since New Deal as national economy developed and unified (anything with “substantial effect” on economy).
- But this is huge step. Federal Government has never forced citizens to buy a good or service (e.g., flood insurance is not mandatory, even in flood zones).
- All traditional areas of state control (property, wills and trusts, employment, sales of goods, corporation law) could be argued to “affect” commerce.
- Would federalize 1/6 of national economy.
- Decision “not to buy” insurance is not an “act” of commerce.
- Can we force people to buy American cars? Or broccoli?
- What if you choose to spend limited resources on gym membership rather than a doctor?
- “Necessary and Proper” Clause meant to provide some natural limits on Federal takeover under their enumerated powers; tied to “substantial effect.”
- 5th Amendment (Due Process) prohibits taking of personal property.
- 10th Amendment (Enumeration) limits Congress to enumerated rights.
- Recent case law (Lopez, 1995 re gun-free school zones) (Morrison, 2000 re gender-motivated violence against women) establishes rule that the Commerce Clause is not a general police power. There must be a “limiting principle.”

### ***Government Argument that Individual Mandate is Constitutional***

- Congress has authority to require purchase of health insurance under three different provisions of the Constitution:
  - Commerce Clause
  - Taxation Clause
  - Necessary and Proper Clause
- The Commerce Clause gives Congress the power to regulate commerce among the several states
  - Health and health insurance constitute interstate commerce
  - Medicare, Medicaid, FDA food and drug labeling are regulated by the government
  - Health care is huge part of our economy, largely paid through insurance
  - Health insurance is fundamental to the system because
    - timing of need for health care unpredictable
    - cost is huge
    - eventual need for health care is inevitable
  - Legal precedent supports regulation of activities not involving actual products or services moving between the states
    - *Wickard v. Filburn* (1942) — wheat for personal consumption
    - *Gonzales v. Raich* (2005) — most recent case
  - Limiting cases not relevant
    - *Lopez* (1995 guns in schools) and *Morrison* (2000 crimes against women) involve noneconomic criminal statutes.
    - Individual Mandate is economic regulation with direct effect on interstate markets for health insurance and health services.
    - Courts will have no problem distinguishing these marginal types of activities from ones such as Individual Mandate directly related to legitimate regulatory scheme at the heart of a major industry.
- The Taxation Clause gives Congress power to collect taxes and provide for the general Welfare of the United States.
  - Congress has authority to set up system of universal coverage and can tax for that purpose
  - Congress can take more taxpayer-friendly approach of allowing individual to purchase insurance of own choosing instead of paying tax or penalty
- The Necessary and Proper Clause gives Congress power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.
- Notions of individual liberty do not invalidate this
  - Insurance mandate not a “taking” of property for private use — public purpose to achieve universal health care and avoid imposing private costs on public
  - Right to receive a free ride at expense of society not a fundamental right guaranteed by the Constitution

## **Severability**

What happens to the rest of the health care law if the Individual Mandate is struck down? If one provision of a law is held unconstitutional, can the rest stand? Depends whether it is “integral” to the law and its purpose.

Congressional intent may be shown by a severability clause. Even though such a clause was discussed and in earlier drafts, it was not included. The Florida District Court struck down the whole law. The 11<sup>th</sup> Circuit severed.

### ***Government argument for severability***

- Object is to decide what Congress would have wanted
- Most reforms unrelated to private insurance; Congress would have wanted to keep them
- If Individual Mandate is invalid, insurance industry costs will rise, but many regulatory statutes raise industry costs; Congress can address any serious problems in subsequent legislation
- Strong legal presumption in favor of severability
- No severability clause, but standard congressional drafting practice is to omit clause
- Except where Congress specifically wants to require all or nothing, a non-severability clause should be used

### ***States’ argument that the whole act should fall***

- Congress intentionally didn’t put in severability clause after considering it
- Without the Individual Mandate, insurance companies would fail, leaving us with a single payer system of socialized medicine
- The Supreme Court can’t rewrite the law to second guess what Congress would have wanted if there was no way to get healthy people into the system

## **Medicaid**

Medicaid is a program of health insurance for the poor. It is run by the states, with Federal matching grants. State participation is not required but all have it now and it would be almost impossible to drop. The law expands the Medicaid program significantly. Initially the expansion is funded by Federal government, but ultimately states will be required to pick up 10% of the cost. States have challenged this because of the impact on their budgets.

### ***States’ Argument that Medicaid Expansion is Unconstitutional***

- Massive expansion of Medicaid will cripple the already stressed State budgets
- Majority of States have filed suit
- This use of the Spending Clause (implied in the Taxing/General Welfare Clause) is coercive

- To threaten health of the States is a threat to state sovereignty and the Constitution's fundamental balance of State and Federal power
- This is coercion because the alternative to drop out of Medicaid is no longer a real option for the States

### ***Government Argument against Challenge to Medicaid Expansion***

- State challenge is based on a theoretical legal theory mentioned in two cases but never applied
- There is no coercion; state participation is optional
- Clear from beginning that changes could be, and have been, made
- The Federal government is picking up most of cost
- Phased in over several years, there is opportunity for states to adapt

### **Ripeness**

This is an argument that the case challenging the constitutionality of the Individual Mandate must be dismissed because the lawsuit was premature. Under the Federal Anti-Injunction Act, you can't challenge a tax law before someone actually pays the tax or a penalty. The mandate doesn't even kick in until 2014. The challenge to dismiss the case because it isn't "ripe" is relevant only if the Individual Mandate penalties are deemed a "tax". The government raised this issue, but has dropped the challenge. Nonetheless the Supreme Court wants to hear it.

### ***Argument that the Case is Premature or is not yet Ripe***

- Only issue is whether the sanctions under the Individual Mandate should be considered a tax or a penalty
- Although law calls this a "penalty", it is for all intents and purposes a tax:
  - Reported to and enforced by IRS under the tax code
  - Paid on the taxpayer's tax return
  - Determined as a percentage of the person's reportable income
  - Excused if household income is below income tax filing threshold
- Not called a tax for political reasons (no one ever complained about raising penalties) but it is a tax substantively
- Because no tax or penalty has been imposed, the case should be dismissed as premature under the Anti-Injunction Act

### ***Argument against Dismissing Case Based on Ripeness***

- This is not a tax; not intended to raise revenue
- Penalty amount is modest; question whether it's enough to drive behavior
- Congress called it a penalty, not a tax
- No party seeks this
- Leaves too much uncertainty