ObamaCare: Not What the Doctor Ordered

Andrew L. Schlafly, Esq.

"Every word in a bill is subject for an argument in court," U.S. Supreme Court Justice Stephen Breyer told Congress on Apr 15, 2010. He was addressing a concern about how few cases the Supreme Court accepts for review, totaling about 1 percent of the cases brought before it. Justice Breyer then implied that it would probably need to expand its workload soon: "You have passed a law with 2,400 pages. It probably has a lot of words. And I would predict, as a test of my theory, that three or four years from today, no one is going to ask us again why we have so few cases."[1]

Justice Breyer was obviously referring to "The Patient Protection and Affordable Care Act," otherwise known as "ObamaCare," which had just become federal law a few weeks earlier, on Sunday, Mar 21. This is the bill that Speaker Nancy Pelosi insisted should be passed so that the public could then learn what was in it, *after* passage.

One of the legal challenges to the constitutionality of ObamaCare is the lawsuit brought by the Association of American Physicians & Surgeons (AAPS), filed three days after the bill was signed into law.[2] Nearly two dozen states sued to block implementation of the bill based on numerous constitutional defects, but only one national medical society sued: AAPS. In contrast to the other lawsuits, AAPS filed its action in federal court in the District of Columbia, a court accustomed to hearing challenges to federal laws and regulations. AAPS is unique in asserting a Takings Clause claim, as discussed further below.

So what is in the massive 2,400-page ObamaCare monstrosity? Legislative mandates will require private citizens to purchase government-controlled health insurance, which will include the costs of many new federal mandates such as paying for sex offenders to use Viagra. Citizens who fail to purchase government-approved insurance plans will pay a penalty up to 2.5 percent of their income. There are exemptions and subsidies for Americans based on the level of their annual income; those who make less, whether by choice or circumstance, get a free ride.

The law forces insurance companies to spend at least 80 percent or 85 percent, depending on the size of the plan's group, on government-approved medical care, leaving nothing for reimbursement for non-government-approved care. With this master stroke, insurance reimbursements for innovative care will drop to zero, as insurance companies will have neither the incentive nor the funds to make payouts above and beyond the government threshold.

ObamaCare was based in part on the program enacted in Massachusetts, and signed by then-Governor Mitt Romney. Back in April 2006, Romney declared in *The Wall Street Journal*: "Some of my libertarian friends balk at what looks like an individual mandate. But remember, someone has to pay for the health care that must, by law, be provided: Either the individual pays or the taxpayers pay. A free ride on government is not libertarian."[3] But government interference in medical care is not libertarian either.

Now having presidential ambitions of his own, Romney is distancing himself as far from ObamaCare as possible. After Massachusetts imposed its individual mandate to require people and businesses to purchase insurance, many chose to remain uninsured rather than buy a product they did not want. Others yielded to government force, and then decided to use what they have been forced to buy, thereby crowding into physicians' offices and causing long waiting times that can approach a year merely to have a simple physical. Some physicians in Massachusetts even see groups of patients at the same time, eliminating individual visits.

If a substantial percentage of the public refuses insurance that conforms to government requirements, then the insurance companies could go out of business due to the heavy costs of the new mandates without offsetting individual premiums to fund them. And that result may be what many supporters of ObamaCare have wanted from the outset, so that government can then swoop in with a single-payer substitute. Or the opposite could result: a free market could emerge and cause real reform when the stranglehold of socialized medicine is thrown off.

Timing of the Impact of ObamaCare

Contrary to media claims about a lack of immediate effect, many provisions in ObamaCare kick in immediately. For example, new taxes on some facilities, such as tanning parlors, take effect this year. There is also an immediate creation of temporary high-risk pools with subsidized premiums for selected patient categories with pre-existing conditions.

The huge impact scheduled in 2014 packs an economic wallop that hits people and businesses now. There was a 10 percent drop in value of health-related stocks due to enactment of the law, despite a general rise in stock market values over the same period. That large drop now suggests the free market's anticipation of a huge problem in 4 years.

This bill has an immediate economic impact on the value of physician practices having more than 50 employees. Those businesses must purchase costly health insurance for their employees, insurance that the employees may not even want or use. Practices

offering Health Savings Accounts (HSAs) are hurt because they may no longer qualify as government-approved medical insurance.

Some physicians are now planning to retire early if the bill is not overturned, and some bright students considering a medical career will probably forgo it because they wanted to practice innovative medicine in the free market rather than Post Office-style medicine controlled by government bureaucrats. Rural areas, already facing physician shortages, can expect shortages to worsen, and businesses may decide against relocating to rural areas, given that there will be fewer physicians to serve them there.

The year 2014 is not very far off. By analogy, if we knew that a giant meteor would crash into the Earth in 2014, then that expected event would have a huge immediate impact on behavior today. Unless Congress defunds ObamaCare, or rescinds it, or a court invalidates it as unconstitutional, then a huge disaster is going to disable the practice of medicine in 2014.

Health Insurance Mandates

Patients and physicians are not the only ones affected by ObamaCare. Health insurance companies have been subjected to expensive new mandates:

- The bill prohibits lifetime and annual limits on expenses.
- The bill limits coverage exclusions of pre-existing health conditions in adults.
- The bill prohibits traditional insurance company bans on pre-existing health conditions in children.
- The bill requires family insurance policies to include children up to the age of 26.
- The bill requires direct access to obstetrical and gynecological care, which will include abortion.
- Health plans are prohibited from discriminating against any providers, but are also not required to contract with any providers, so physicians who take insurance will still be heavily influenced by insurance company controls.

Bureaucracy

Many of the 2,400 pages in the bill establish vast new bureaucracies and cumbersome displacements of the free market. For example, the bill requires, by 2014, the creation of health insurance exchanges or marketplaces that will be state-based and state-administered. Insurance can be sold within the exchange only if government-approved; insurance can also be sold outside of the exchange, but it is doubtful there will be much of a market for that. States can opt out of the exchange only if and when they satisfy certain government-mandated conditions.

The bill requires health plans to develop politically correct services, such as community outreach and so-called cultural competency training.

The bill establishes a new Consumer Operated and Oriented Plan (CO-OP) program, supposedly with the goal of creating nonprofit, member-run health insurance companies in every state. It seems unlikely, however, that any of these CO-OPs will be able to coexist with private insurance. Over time, one approach will likely squeeze out the other.

Popular Legal Arguments Against the Bill

Many articles against the bill have been published in newspapers and on blogs; 21 states and AAPS have challenged the constitutionality of the bill. On May 14, the largest association of small businesses—the National Federation of Independent Business (NFIB)—joined the lawsuit brought by many states in Florida. If Justice Breyer's expectation becomes reality, then the U.S. Supreme Court will likely have the last word in a few years on whether the bill is constitutional.

Most of the lawsuits focus on the lack of constitutional authority for Congress to bring the practice of medicine under federal control, and to require individuals to purchase insurance. Directing Americans' medical care is not one of the powers delegated by the people to the government in the Constitution. The bill violates the Tenth Amendment, which reserves to the states and the people all powers not expressly conferred by the Constitution on Congress.[4]

Several commentators have noted that never in history has Congress penalized or taxed inactivity (the lack of buying insurance). The Sixteenth Amendment limits the power to tax to income, and a tax on a failure to purchase insurance is not a tax on income.

The constitutional justification provided by Congress in the text of the bill is the Commerce Clause:

> The individual responsibility requirement provided for in this section...is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

Paragraph 2 states:

> The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.

However, as Professor Randy Barnett astutely observed in T*he Wall Street Journal*,[5] the Joint Committee on Taxation released a very different 157-page "technical explanation" of the bill on the same day that it passed. This "explanation" of the constitutionality of the bill did not even mention "commerce," but instead claimed that the tax authority of Congress was adequate power for it:

> [W]hile the enacted bill does impose excise taxes on "high cost," employer-sponsored insurance plans and "indoor tanning services," the statute never describes the regulatory "penalty" it imposes for violating the mandate as an "excise tax." **It is expressly called a "penalty"** [emphasis in original].

Professor Barnett then explained how several Supreme Court precedents have struck down as unconstitutional penalties that are falsely characterized as taxes. For example, the court held that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with

the characteristics of regulation and punishment" (quotations and citations omitted).[6] Also, "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."[7]

There are other powerful legal arguments against the constitutionality of the bill. Some note that the exemption from the mandatory insurance requirement for religious groups such as the Amish is too narrow to satisfy the constitutional protection for the free exercise of religion by all Americans. There are also objections to the procedures used by Congress to enact the bill. And there is a privacy-based objection, because forcing citizens to purchase insurance intrinsically forces them to divulge confidential medical information to insurance companies.

AAPS's Takings Clause Argument

In addition to asserting many of the claims above, AAPS includes a special claim that is lacking from most other suits: the individual mandate forcing people to buy insurance is an unconstitutional "taking" of property from one person (a patient) to give to another (the insurance company). While the U.S. Supreme Court famously upheld (by a narrow 5-4 margin) the taking of the home of Susette Kelo to give it to Pfizer against her wishes (under color of eminent domain for public use with court-determined "just compensation"),[8] the taking of cash (insurance premiums) from one person to give to another without "just compensation" is a different matter.

In *Brown v. Legal Found.*, 538 U.S. 216 (2003), the U.S. Supreme Court unanimously held that a "law that requires that the interest on [client] funds be transferred to a different owner for a legitimate public use, however, could be a per se taking requiring the payment of 'just compensation' to the client." *Id.* at 240. At issue in *Brown* was the constitutionality of a Washington law requiring attorneys to deposit client trust funds in a common account for the benefit of a legal aid program if the individual interest amounts to less than individual administrative costs. Though the Supreme Court split 5-4 against compensating the client for the taken interest because the administrative costs exceeded the value at stake, all Justices agreed that seizure of this interest did constitute a taking for purposes of the Fifth Amendment.

A similar unconstitutional "taking" occurs under ObamaCare when an individual is forced to pay for insurance that he does not want, and which may not cover the medical care that he does need. At least some of his premium—perhaps as much as 20%—goes toward administrative costs or profits that have no benefit to the individual forced to pay it. Under the reasoning embraced by the U.S. Supreme Court in *Brown*, this is a taking prohibited by the Fifth Amendment. In other words, he should not be forced to bear that loss; he should not be forced to buy the insurance in the first place. AAPS will cite this precedent to argue for invalidation of this "taking" of property in the form of the mandatory insurance payments.

AAPS adds two more claims missing in the other lawsuits: AAPS demands an honest accounting of the Medicare and Social Security programs.

Reason for Optimism

Some, perhaps surprisingly, are cautiously optimistic that free enterprise will expand amid the rubble and ruins wrought by this legislation. A horse brought to water will not always drink, and a people told to buy an unwanted insurance product may decline to do so and choose to pay the penalty instead. The experiment with mandatory insurance in Massachusetts, a comparably wealthy state where socialism is popular and there are relatively few uninsured, has been an abject failure. Imposing that same approach on a nation nearly 50 times as large and not as wealthy as Massachusetts could cause a bigger failure. The free market is not so easily conquered by misguided legislation, and not even the Berlin Wall and barbed wire could suppress freedom forever.

Conclusion

On May 11, 2010, an "unbeatable" member of Congress who voted for ObamaCare lost by a stunning 56–44 percent margin *in his own Democratic primary*. Alan Mollohan made a decision on that fateful day of Sunday, Mar 21, and provided one of the final swing votes to enable ObamaCare to pass. Evidently the people of his West Virginia district disagreed with him, and sent this popular, charismatic 14-term Congressman to an unexpected early retirement.

The people support freedom in medicine. But to reverse ObamaCare, physicians will need to band together with the people, both colleagues and patients. AAPS has led the way with its lawsuit, and we invite other medical societies to wake up and join our leadership.

Andrew Schlafly serves as general counsel to AAPS. Contact: Aschlafly@aol.com.

REFERENCES

1. Stajda R. *Justice Breyer: Health Care Reform Could Appear Before Supreme Court* (Video). TPM. Available at: http://tpmdc.talkingpointsmemo.com/2010/04/justice-breyer-health-care-reform-could-appear-before-supreme-court.php. Accessed May 21, 2010.
2. *AAPS v. Sebelius et al.* Available at: www.aapsonline.org/hhslawsuit. Accessed May 21, 2010.
3. Dionne EJ. Health-care reform nullifiers taking us back to 1830s. *Charleston Gazette* (West Virginia), Apr 1, 2010:4A.
4. Christman KD. Ignoring the U.S. Constitution results in the destruction of medicine in the Hippocratic tradition. *J Am Phys Surg* 2010;15:20-23. Available at: www.jpands.org/vol15no1/christman.pdf. Accessed May 18, 2010.
5. Barnett RE. The insurance mandate in peril. *Wall St J.* Apr 29, 2010.
6. *Dept of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (U.S. 1994).
7. *Sonzinsky v. U.S.*, 300 U.S. 506, 513-14 (1937).
8. *Kelo v. New London*, 545 U.S. 469 (2005).