



# THE LEGAL BRIEF



## *Is Health Care Reform Constitutional?*

by John D. Whitaker

Well, let me go way out on a limb here and unequivocally state that your guess is as good as mine. The simple answer is that what we think does not matter. It depends on what the 9 Justices of the United States Supreme Court think. Good luck in predicting that.

The provision drawing the most fire is the mandate, which requires most people to either buy insurance from private insurance companies or pay some kind of fine or tax. The fine is supposed to be roughly equal to the cost of an insurance premium. In order for the program to work, most people will be forced to buy insurance or pay the penalty. The idea is to make the healthy individuals among us pay for insurance we hopefully will not use so that the insurance companies and the government will have enough money to provide benefits for the people who will need the insurance but can't afford to pay for it. Whether Congress has the authority to make this kind of law is disputed by the States who have filed suit to block its implementation.

The analysis must begin with the 10th Amendment, which provides that any power not delegated to the federal government in the Constitution is reserved to the States or the people. So, if the power to write this kind of law is not enumerated in the Constitution then the law is unconstitutional.

Supporters of the bill argue that there are two separate clauses in the Constitution in Article 1, Section 8, which provide authority for the mandate. The General Welfare clause provides: "The congress shall have the power to lay and collect taxes...and provide for the... general welfare of the United States." Supporters argue that the federal government has the power to tax and spend money for the general welfare of the people. So, if the penalty is really just a tax assessed in order to make health care more affordable and readily available to the citizens it will clearly increase the general welfare. The second provision is what is commonly called the "Commerce Clause." This clause is often cited in conjunction with the necessary and proper clause of



the Constitution to permit a broad range of regulations concerning any activity which substantially affects interstate commerce. Historically, the federal government has not directly regulated the insurance market, but national health care does affect interstate commerce, so the answer may depend upon how the Courts frame the issue.

Opponents argue that the government does not have the authority to force people to go into the private insurance market and buy insurance. They make a distinction in prior commerce clause cases where the government was seeking to prohibit people from doing something, and this case where they are actually commanding people to do something. They argue that the Supreme Court has never upheld a law which penalizes a private citizen who refuses to enter into a contract with a private company. In any event, opponents argue that the States have generally held the regulatory power over insurance companies. They argue that forcing people to buy private insurance goes beyond Congress's enumerated powers and is therefore unconstitutional. Historically, the regulation of insurance companies has been a question of state law, but the federal government has essentially started regulating some insurance contracts under ERISA and the regulations have been approved by the US Supreme Court. It is hard to say where they are going to wind up on this question.

This issue is a lot more complicated than my brief explanation above would suggest, but there are a few things we do know. We do know for example that Acts of Congress are given wide latitude by Courts and legislative action is presumed to be constitutional. Another thing we know is that we don't know much about what is actually in the reform act. If it turns out to be a good thing, I can't imagine the Supreme Court would be in a hurry to rule in such a way as to breathe new life into the now allegedly defunct concept of pre-existing conditions. Still, I never dreamed that the United States Supreme Court would overrule 100 years of precedent in finding that Congress cannot put limits on the political free speech rights of corporations. Shows how much I know.

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