

Legal Challenges to the Affordable Act

Since the enactment of health reform legislation in March, more than 20 federal lawsuits have been filed challenging the constitutionality of the individual responsibility requirement in the Affordable Care Act, several of them politically motivated. In Florida, 15 Republican State Attorneys General and 5 Republican Governors filed a lawsuit in Florida -- 32 Republican Senators and 64 Republican House Members have signed onto amicus briefs to support this challenge.

Having failed in the legislative arena earlier this year to block reform, opponents have turned to the courts to try to overturn the work of the democratically elected branches of government. This is nothing new. We saw this with the Social Security Act, the Civil Rights Act, and the Voting Rights Act – constitutional challenges were brought to all three of these monumental pieces of legislation, and all of those challenges failed. So too will challenges to health reform. Already, the two cases (one in the Western District of Virginia and another in the Eastern District of Michigan) where federal judges have ruled on the merits of this challenge have been dismissed. Additional rulings in Florida and Virginia are expected in the upcoming weeks.

The Individual “Responsibility” Requirement

We need every American to act responsibly to strengthen our health care system. When people seek medical care without health insurance and don't pay for it, it adds more than \$1,000 per year to the premiums of American families who act responsibly by having coverage. To lower the cost of health care for everyone, we have to stop making those who act responsibly pick up the health care tab for those who don't – and that means we need everyone to be a part of the health insurance marketplace. Just as you can't wait to get car insurance until you get into a car accident or rely on others to pay for the damages, you can't wait until you get sick to get health insurance, or rely on the fact that emergency rooms won't turn you away even if you can't pay.

To fix the problem of uncompensated care and the shifting of costs to those who have insurance, the Affordable Care Act requires people who can afford it to carry minimum health coverage beginning in 2014. For the 83% of Americans who have coverage today, this means they are already taking responsibility for their health care, and will need to do very little. Many of the 17% of Americans living without health insurance either can't afford it or have been denied coverage because of a preexisting condition. The Affordable Care Act provides tax credits to people who need help paying for insurance and hardship waivers to individuals or families who can't afford it at all. And the Act expands Medicaid coverage for many lower income Americans. Those who can afford it, but refuse to buy it, will face a penalty.

The Affordable Care Act also bans insurance companies from discriminating against people with preexisting conditions beginning in 2014 (In 2010, insurance companies were banned from discriminating against children). However, unless every American is required to have insurance, it would be cost prohibitive to cover people with preexisting conditions. Here's why: If insurance companies can no longer deny coverage to anyone who applies for insurance – especially those who have health problems and are potentially more expensive to cover – then

there is nothing stopping someone from waiting until they're sick or injured to apply for coverage since insurance companies can't say no. That would lead to double digit premiums increases – up to 20% – for everyone with insurance, and would significantly increase the cost of health care. We don't let people wait until after they've been in a car accident to apply for auto insurance and get reimbursed, and we don't want to do that with healthcare. If we're going to outlaw discrimination based on pre-existing conditions, the only way to keep people from gaming the system and raising costs on everyone else is to ensure that everyone takes responsibility for their own health insurance. If we don't, then we will go back to the days of allowing insurance companies to deny coverage to people with pre-existing conditions.

Constitutional Challenges – Putting People with Pre-Existing Conditions at Risk and Raising the Costs of Care

Opponents of reform have challenged the constitutionality of the Affordable Care Act, claiming that the individual responsibility provision exceeds Congress' power to regulate interstate commerce. Claims that this requirement penalizes inactivity incorrectly describe what is taking place. Individuals who choose to go without health insurance are engaged in economic decision making – the decision to pay for health care out-of-pocket or to seek uncompensated care. Every year millions of those who have chosen to go without health insurance actively seek medical care, which is evident in the billions of dollars spent on uncompensated care. Further, this claim is at odds with over 70 years of settled law.

The Affordable Care Act falls well within Congress's power to regulate under the Commerce Clause, the Necessary and Proper Clause, and the General Welfare Clause. In order to make health care affordable and available for all, the law regulates how to pay for medical services – services that account for more than 17.5% of the national economy. This law came into being precisely because of the interconnectedness of our health care costs. People who make an economic decision to forego health insurance do not opt out of the health care market, but instead shift their costs to others when they become ill or are involved in an accident and cannot pay. Those costs – \$43 billion in 2008 alone – are borne by doctors, hospitals, insured individuals, taxpayers and small businesses throughout the nation. This cost-shift added on average \$1,000 to family premiums in 2009 and roughly \$410 to an individual premium.

This concept is clearly seen in other areas of commerce. For example, in most states, drivers are required to carry a minimum level of auto insurance. Accidents happen and when they do, they need to be paid for quickly and responsibly. Requiring drivers to carry auto insurance accomplishes this goal. Similarly, the Affordable Care Act, through the individual responsibility requirement, will require everyone to carry some form of health insurance since everyone at some point in time participates in the health care system, and incur costs that must be paid for.

It's no surprise then, that President Reagan's Solicitor General Charles Fried recently wrote, "the health care law's enemies have no ally in the Constitution." Two federal judges that recently ruled on the challenge to the constitutionality of the reform law in Michigan and Virginia agreed. These lawsuits were dismissed, with the federal judge in Virginia concluding "how and when to

pay for health care are activities...in the aggregate...substantially affect[s] the interstate health care market.”

Health Experts and Patient Groups Back Affordable Care Act

While they rest on weak legal arguments, the challenges to the law have attracted significant media attention and support from the opponents of reform. However, it is notable that not a single disease or patient organization has signed onto amicus briefs opposing the law. In fact, prominent health experts, economists, and patient groups have signed onto amicus briefs in support of the Affordable Care Act—recognizing that it provides important reforms to our health care system, ends insurance company abuses, and ensures everyone has access to affordable care.

Health care advocacy groups, such as: the National Association for Community Health Centers that represent more than 7,000 health centers that serve 20 million Americans, in all fifty states; the National Breast Cancer Coalition which composes of 600 member organizations and over 60,000 individuals; the American Nurses Association—representing 3.1 million of the nation’s registered nurses, among many others, have filed amicus briefs in support of the law. In addition, 35 economists, including 3 Nobel laureates, the Small Business Majority, 75 state legislators, 3 states, 4 governors, 6 hospital associations from all over the country have submitted amicus briefs in support of the law.

Opponents’ Victory Would Once Again Allow Insurance Companies to Discriminate

If the constitutional challenge to the Affordable Care Act’s individual responsibility requirement ultimately prevails, it would mean that provisions preventing health insurance companies from discriminating against people with pre-existing conditions would also be invalidated by the court because the two are inseparably linked. If insurance companies are required to cover those with pre-existing conditions, who are potentially more expensive to cover, without requiring everyone—both sick and healthy people—to have insurance, premiums will increase rapidly. Similarly, other provisions – including banning insurers from discriminating based on health status, age and gender – would also fall.

Without an individual responsibility requirement:

- Spending on uncompensated care would increase beyond the \$62.1 billion already spent on uncompensated care today.
- 16 million more people would be uninsured relative to current estimates of projected uninsured under the Affordable Care Act.
- Insurance companies would again be allowed to deny or limit benefits for individuals with pre-existing conditions, charge women and older Americans significantly more for coverage.

However, many parts of the new law would remain intact. While the law does not include a severability clause, courts have a constitutional obligation to preserve as much of a statute as possible. Portions of the law such as the new provisions that expand access to Medicaid and

create Exchanges – new competitive marketplaces where consumers and small businesses can shop for private coverage giving them market power similar to large employers and permits easy comparison of available options based on price, benefits, services, and quality – will be unaffected by the rulings in these cases. Other provisions that would remain effective include tax credits for small businesses and rules that will strengthen Medicare by closing the prescription drug coverage gap known as the donut hole and extend free preventive care to Medicare beneficiaries.

The Bottom Line

The Affordable Care Act includes landmark consumer protections that will strengthen the health care system, including banning insurance companies from discriminating against Americans with pre-existing conditions, age, health status or gender. The court challenges to the law are without legal merit, but if they were to succeed, uncompensated care costs would continue to rise rapidly, premiums for families would rise and many of the benefits of reform will not reach the American people.