# "Did Congress Tip the Scale of Power Too Far?" – The United States Supreme Court Will Soon Determine the Constitutionality of the Patient Protection and Affordable Care Act

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Since it became law in March 2010, there has been much debate regarding the constitutionality of President Obama's Patient Protection and Affordable Care Act[1] (the "Affordable Care Act"). Over the past year several federal courts throughout the country have issued opposing rulings on its constitutionality resulting in both the administration and various states to request the nation's highest Court hear the case. On November 14, 2011, their request was granted with the United States Supreme Court granting certiorari and agreeing to decide the constitutionality of the law. Specifically, the Court has agreed to address a number of issues with much of the legal debate to center upon the constitutionality of the "individual mandate" and whether the balance of the law can survive without the individual mandate. Ultimately, whatever the Court's decision on each of the legal issues, its ruling will have a far reaching impact on providers, insurance companies, patients, Medicaid, Medicare and almost all other aspects of the healthcare industry.

**I. Recent Federal Circuit Court Decisions**

The constitutionality of the Affordable Care Act has been addressed by several United States District Courts and United States Circuit Courts of Appeals. For a case to make it to the United States Supreme Court, it typically must ascend through the court structure from the District Court to the Circuit Court of Appeals and finally to the Supreme Court. To date, several District Courts have ruled on the constitutionality of the Affordable Care Act and four Circuit Courts of Appeals have heard appeals from the District Courts. Specifically, decisions have been rendered by the following Courts of Appeals: the Sixth Circuit[2] (June 29, 2011), the Eleventh Circuit[3] (August 12, 2011), the Fourth Circuit[4] (September 8, 2011), and, most recently, the D.C. Circuit[5] (November 8, 2011).

In reviewing the Affordable Care Act, the Sixth Circuit, which oversees federal cases in Michigan, Ohio, Kentucky, and Tennessee, upheld the District Court's determination "that the minimum coverage provision of the Patient Protection and Affordable Care Act is constitutionally sound."[6] In doing so, the Sixth Circuit Court of Appeals upheld the lower court's finding that Congress had a rational basis for concluding that, in the aggregate, the practice of self-insuring for the cost of health care substantially affects interstate commerce. Further, the appellate panel held that Congress had a rational basis for concluding that the minimum coverage (*i.e.,* the individual mandate) provision is essential to the Affordable Care Act's larger reforms to the national markets in health care delivery and health insurance. Finally, the Sixth Circuit held that the individual mandate provision regulates active participation in the health care market, and in any case, the Constitution imposes no categorical bar on regulating inactivity. Thus, it is

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a valid exercise of Congress' authority under the Commerce Clause, and the decision of the District Court was affirmed. The court declined to address the constitutionality of the individual mandate under the government's tax power.

In contrast, the Eleventh Circuit, which oversees federal cases in Alabama, Georgia and Florida, struck down the individual mandate as unconstitutional while upholding the remainder of the law. While the Eleventh Circuit presumed the constitutionality of the individual mandate, it nevertheless found that Congress overstepped the limits of the Commerce Clause in creating a requirement that all citizens buy health insurance. The court viewed the individual mandate as a requirement of all citizens to purchase health insurance for the duration of their life. Thus, to permit such a broad requirement would shift power to the federal government to such a degree that it would "imperil our federalist structure" of government. Moreover, the court viewed the areas of regulation of the insurance and healthcare industries as traditionally ones of state concern that should be left to state regulation. Therefore, the Eleventh Circuit struck down the individual mandate as beyond the scope of Congress' power under the Commerce Clause. The court analyzed several other theories advanced by the government, such as the right of Congress to tax, but similarly found these other arguments unconvincing to support the imposition of an individual mandate to purchase health insurance. The Eleventh Circuit thus severed the individual mandate from the remainder of the Affordable Care Act thereby preserving the remainder of the law.

Next, the Fourth Circuit, which oversees federal cases in West Virginia, Virginia, Maryland, North Carolina and South Carolina, chose not to hear the substance of the case. Instead, it ruled that the Commonwealth of Virginia, the sole entity that filed the original case in the District Court, lacked standing to pursue a challenge to the Affordable Care Act. Thus, the Fourth Circuit did not reach the question of whether the Constitution authorizes Congress to enact an individual mandate, reversing the District Court's ruling in favor of the Commonwealth of Virginia with instructions that the case be dismissed.

Most recently, the D.C. Circuit, which oversees federal cases in the District of Columbia only, ruled that the Affordable Care Act is constitutional. Traditionally, the D.C. Circuit rulings receive particular attention from the Supreme Court. Therefore, the D.C Circuit's reasoning deserves specific discussion. The challenge, as in the previous lawsuits, involved the individual mandate and was based upon Congress exceeding its power under the Commerce Clause and acting in violation of the Religious Freedom Restoration Act. The Religious Freedom Restoration Act was not addressed in the majority opinion. The opponents to the law argued that "Congress cannot *require* individuals with no connection to interstate commerce, and no desire to purchase a product, nonetheless to do so," and that the authority of Congress is limited to *existing* commerce, for instance, to individuals who have taken affirmative steps to participate in the interstate market, and only for the duration of those activities. The contested issue was "whether the Government can require an immensely broad group of people – all Americans, including uninsured persons with no involvement in the health insurance and health care markets – to buy health insurance now, based on the mere *likelihood* that most will, at some point, need health care, thus virtually inevitably enter that market, and consequently substantially affect the health insurance market."

The D.C. Circuit Court reasoned that the United States Constitution does not limit commerce power to *existing* commerce power, noting that "No Supreme Court has ever held or implied that Congress' Commerce Clause authority is limited to individuals who are presently engaging in an *activity* involving, or substantially affecting, interstate commerce." The Court relied on the 1942 Supreme Court case of *Wickard v. Filburn,*[7] where a farmer ran afoul of his allowed wheat acreage under the Agriculture Adjustment Act of 1938 by growing additional wheat. The fact that the wheat was for personal consumption and the farmer planned not to participate in interstate commerce, was not relevant because even growing wheat for personal consumption could affect national prices as that farmer would no longer have to purchase the wheat on the open market. Thus, through the *Wickard v. Filburn* case, the principle of "aggregate effects" on interstate activity was born, meaning that national economic problems may be the result of millions of individuals engaging in behavior that, in isolation, is seemingly unrelated to interstate commerce. If farmers like Filburn all exceeded their quotas, the mechanics of the wheat market made it inevitable that the interstate market would be impacted—either by the *likelihood* that the high price of wheat Congress was trying to maintain would induce some unspecified number of farmers to sell wheat at market after all, or the *probability* that farmers who had enough wheat for their own use would stop buying wheat at the market.

The rationale of *Wickard v. Filburn* and several subsequent cases that further minimized the significance of any particular individual's behavior led the D.C. Circuit Court to reject the "inactivity argument" and conclude that it is "irrelevant that an indeterminate number of healthy, uninsured persons will never consume health care, and will therefore never affect the interstate market." It found that broad regulation is an "inherent feature of Congress' constitutional authority in this area; to regulate complex, nationwide problems is to necessarily deal in generalities," and thus, "Congress reasonably determined that as a *class,* the uninsured create market failures; thus the lack of harm attributable to any particular uninsured

individual, like their lack of overt participation in the market, is of no consequence."

On September 28, 2011, in response to the varying District Court and Circuit Court of Appeals decisions, the United States Department of Justice filed papers requesting that the United States Supreme Court consider the constitutionality of the Affordable Care Act in response to the Eleventh Circuit's ruling against the law.

Based upon these decisions and submissions, the Court's decision is likely to turn on Congress' power to regulate healthcare via the Commerce Clause of the Constitution, which permits Congress to regulate interstate commerce. There are other interesting arguments that have also been asserted, such as the applicability of Congress to levy taxes pursuant to the General Welfare Clause of the Constitution, which might ultimately be of interest to the Court. However, at this point in time, the scope of the Commerce Clause has been the centerpiece of debate on the constitutionality of the Affordable Care Act.

**II. Dynamics in the United States Supreme Court**

With the Court agreeing to address the constitutionality of the Affordable Care Act, speculation has already begun as to how the Justices will likely vote and whether any of them have an obligation to recuse themselves from this case. A review of the nine Justices suggests that, based upon their respective views on these types of constitutional issues, Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan will most likely find the Affordable Care Act to be constitutional, while Chief Justice John Roberts along with Justices Antonin Scalia, Clarence Thomas and Samuel Alito will most likely find the Affordable Care Act to be unconstitutional. This leaves Justice Anthony Kennedy as the swing vote in what is likely to be a 5-4 decision by the Supreme Court.

This even split among the Justices is also the basis for many advocates' attempt to derive reasons for particular Justices to recuse themselves from participating in this case, thereby shifting the balance either in favor or against the Affordable Care Act's constitutionality. The federal statute governing recusal of a United States Supreme Court Justice requires recusal anytime his or her "impartiality might reasonably be questioned," and lists specific instances where a Justice should recuse him or herself.[8] Included in that list are such items as personal bias, where the Justice was involved in the case prior to taking the bench either as a private attorney or through government employment, or where the Justice or his family have some sort of financial or other substantial interest in a particular party or outcome.

One group or another has suggested that three Justices, in particular, might need to recuse themselves from this case. The first is Justice Scalia who attended and spoke at a seminar sponsored by the Tea Party, the now well-known political group which is opposed to the Affordable Care Act. These groups have argued that Justice Scalia has failed to show impartiality on this issue by associating with the Tea Party. The second is Justice Thomas whose wife is a lobbyist for various entities opposed to the law. Some groups argue that Justice Thomas' wife's work affiliation creates a financial incentive to her if the law is overturned and thus creates the appearance of a conflict of interest. The third is Justice Kagan who served as President Obama's Solicitor General during the period of time the Affordable Care Act was being deliberated. If, in fact, she served as an advisor in the early deliberations of this law, it would squarely fall within one of the bases for recusal. Recent evidence, however, suggests she may have made great efforts to avoid involvement in meetings concerning the law. While there does not appear to be a paper trail of her involvement, some evidence still leaves open questions about whether she participated in meetings or telephone conferences.

Ultimately, however, given the significance of this case and the impact recusal by any one Justice would have on the outcome, most believe it is unlikely that any of the Justices will recuse him or herself absent some new information coming to light. Thus, if all nine participate, Justice Kennedy is almost sure to become the swing vote in deciding the future of the Affordable Care Act.

**III. Recent Commerce Clause Decisions of the Supreme Court**

There are three relatively recent Supreme Court cases, *Morrison, Lopez* and *Raich,* which provide a glimpse into the Justices' thinking on the scope of the Commerce Clause and their willingness to accept the scope of Congress' authority and power under the Commerce Clause.[9]

In *Morrison* and *Lopez,* the Court struck down "single-subject" criminal statutes (the Gun Free School Zones Act and the Violence Against Women Act) finding that those laws exceeded Congress' power under the Commerce Clause. There were four main reasons for the holdings: (1) the statutes regulated non-economic, criminal activity, and were not part of a larger regulation of economic activity; (2) the statutes contained no jurisdictional "hook" limiting their application to interstate commerce; (3) Congressional findings regarding the effects of the regulated activity on interstate commerce were not sufficient to sustain constitutionality of the legislation; and (4) the link between the regulated activity and interstate commerce was too attenuated.[10]

In *Raich,* the Court upheld the federal Controlled Substances Act, which prohibited the local cultivation and possession of marijuana. The Court held that excluding home-

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grown and home-consumed marijuana from federal control undercuts Congress' broader regulation of the interstate market for marijuana.[11]

Interestingly, the votes of the Justices in connection with these three matters were consistent, and, for those still on the bench, possibly telling of how they may vote in the future. Justices that voted to strike down the laws in *Morrison* and *Lopez* also dissented in *Raich,* where the law was upheld. This means the Justices believed in each case that the particular law at issue exceeded the power provided to Congress under the Commerce Clause. This is indicative that this group of Justices (Chief Justice Rehnquist and Justices O'Connor and Thomas) has been consistently of the opinion that Congress' actions exceeded its power. To the contrary, Justices that voted to uphold the laws in *Morrison* and *Lopez,* also voted to uphold the law in *Raich.* This group of Justices (Justices Stevens, Souter, Ginsburg and Breyer) has reinforced their position that Congress has broad power in enacting legislation. Justice Scalia did not join in the majority opinion in *Raich,* but he did concur in the judgment upholding the law. However, although Justice Scalia joined in the opinion of *Raich,* the fact that he joined the majority opinion in both *Morrison* and *Lopez* is indicative of a precedent to strike down federal laws that push the limits of power provided under the Commerce Clause. While some of these Justices are no longer on the bench, their rulings in cases involving similar legal questions provide some insight into their likely positions should the Court decide to review one or more of the petitions.

As noted above, review of the Justices as a whole suggests that it is likely to be a 5-4 decision with Justice Kennedy serving as the decisive swing vote. Justice Kennedy joined the majority opinion in all three cases above and thus upheld Congress' implementation of the Commerce Clause power in two of the cases but not the third.

**IV. The Swing Vote**

Justice Kennedy's concurring opinion in *Lopez,* which struck down a federal law making simple possession of a gun within 1,000 feet of the ground of a school a criminal offense, is most instructive on his view of the power and scope of Congress' authority under the Commerce Clause. While it is true that the individual mandate within the Affordable Care Act is very distinct from Congress' ability to regulate the possession of guns near school grounds, Justice Kennedy's analysis provides insight into his views on the limits and scope of Congress' authority under the Commerce Clause.

Justice Kennedy begins his analysis in *Lopez* by highlighting the boundaries of the three branches of government and the restraint that must be demonstrated by the Court when seeking to limit the scope of the Commerce Clause.[12] He also notes that the long history of jurisprudence regarding the Commerce Clause has provided two significant lessons. First, the Commerce Clause has limits. Second, "the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point."[13]

According to Justice Kennedy, precedent is key when considering issues arising under the Commerce Clause, with the most recent precedent being most authoritative. This means that if the Court can turn to a past decision regarding the Commerce Clause as a guide it should do so. It also means that Justice Kennedy believes that more recent interpretations and analyses of the Commerce Clause should be given greater weight than those from our "18th-century economy."[14] Accordingly, Justice Kennedy is also a pragmatist, looking to apply a legal standard that fits with our present day economy and world, rather than one that is based upon our economy from centuries ago.

Along these lines of thought, Justice Kennedy considers the following: (1) the place of the Supreme Court in the design of the government, and (2) the significance of federalism in the whole structure of the Constitution. In performing this analysis, Justice Kennedy emphasizes the framers ideals of creating two governments to enhance freedom. He speaks of the importance of political accountability and the role of State and Federal Governments to hold each other in check for the benefit of the people. He cautioned, however, that where the Federal Government takes over an entire area of traditional state concern, an area having nothing to do with commercial activity, "the boundaries between the spheres of federal and state authority blur and political responsibility [becomes] illusory."[15]

Justice Kennedy acknowledges that the political process functions as a way to shift power between the State and Federal Government, but recognizes that the federal government has substantial discretion over the balance of federal power. Justice Kennedy instructs that the political branches must remember and preserve this concept of federalism.[16] In reaching these conclusions, Justice Kennedy identifies the judiciary's role to ensure the federal government does not "tip" the scales of power too far in its favor.[17] In *Lopez,* Justice Kennedy found Congress tipped the scale too far because, under the gun control law, neither "the actors nor their conduct [had] a commercial character, and neither the purpose nor the design of the statute [had] an evident commercial nexus."[18] Further, Justice Kennedy found that Congress had exercised national power to intrude on an area traditionally of state concern.[19]

This analysis raises the question of whether Justice Kennedy will find a commercial character in the conduct sought to be regulated by the Affordable Care Act and the individual mandate to purchase health insurance to be an exercise of

national power that is intrusive upon an area of law generally reserved for the states.

The answers are not easily predictable. As the Court itself has observed, an analysis of the Commerce Clause does not fall within neat "mathematical or rigid formulas."[20] On the one hand, Justice Kennedy could easily find the purchase of and failure to purchase health insurance to be a commercial activity well within the scope of Congress' authority and uphold the Affordable Care Act. Justice Kennedy, in *Lopez,* emphasizes Congress' enormous power to regulate commercial activity to ensure a stable national economy. Under this broad view of Congressional power, the distinction between activity and inactivity, or more precisely, the purchase and non-purchase of health insurance, which has been a focal point of the analysis in the Circuit Courts, would be immaterial and unconvincing to Justice Kennedy because activity or inactivity falls within the commercial sphere. Viewed another way, imagine a spectrum with "no activity" at one end and "heavy activity" at the other. The entire spectrum is considered "activity" with the only difference from one end and the other being the *extent* of activity. Consistent with precedent and prioritizing federalism, Justice Kennedy might give little weight to the distinction, find that the conduct Congress sought to control falls squarely within the commercial sphere and, as such, hold that Congress plainly has the power through the Commerce Clause to regulate it.

On the other hand, Justice Kennedy's emphasis on maintaining a balance of power and control by the Federal and State Governments, and in preserving that which has traditionally been regulated by the states suggests he could find the Affordable Care Act, or portions thereof, unconstitutional. Opponents argue that upholding the Affordable Care Act would broaden the scope of Congress' power well beyond that contemplated by the Constitution and thus tip the balance of power to such an extreme that very little, if any activity, would be safe from Congress' regulation under the Commerce Clause. Many see this as an unprecedented expansion of federal control over the healthcare and insurance industries, which the courts and Congress have treated as areas traditionally regulated by the states. Under this view, which preserves the rights of the States under principles of federalism, Justice Kennedy could attempt to ensure the balance of power between Federal and State Governments and find that the individual mandate unconstitutionally crosses the line, regardless of whether the individual mandate is considered regulation of an activity or non-activity.

**V. Conclusion**

Since the passage of the Affordable Care Act there have been seemingly endless questions about its constitutionality. After much debate and numerous court rulings, the Supreme Court is poised to hear the case and finally settle the dispute. If you put nine Justices in a room to debate the issue, you may get ten different rulings. In fact, the authors of this article have differing views on how the United States Supreme Court may ultimately decide the issue -- none of them based on the same legal rationale. Nevertheless, whatever the Court's decision, the outcome of this case will significantly shape the future of the United States healthcare and insurance industries.

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***(Endnotes)***

[1] Pub L. No. 111-148, 124 Stat. 119 (2010), amended by Pub. L. No. 111-152, 124 Stat. 1029 (2010).

[2] T*homas More Law Center v. Obama,* 651 F.3d 529 (6th Cir. June 29, 2011).

[3] *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services,* 648 F.3d 1235 (11th Cir. 2011) .

[4] *Virginia ex rel. Cuccinerlli v. Sebelious,* 3:10-cv-00188-HEH.

[5] *Seven-Sky v. Holder,* No. 11-5047 (D.C. Cir. Nov. 8, 2011).

[6] **Thomas More Law Center,** 651 F.3d at 533.

[7]317 U.S. 111 (1942).

[8]28 *U.S.C.A.* §455.

[9] *United States v. Morrison,* 529 U.S. 598 (2000).
*United States v. Lopez,* 514 U.S. 549 (1995).
*Gonzales v. Raich,* 545 U.S. 1 (2005).

[10] *See Morrison,* 529 U.S. at 601-15; *Lopez,* 514 U.S. at 561-67.

[11] *See Raich,* 545 U.S. at 19.

[12] *United States v. Lopez,* 514 U.S. 549, 563 (1995) (concurring opinion).

[13] *Id.* at 574.

[14] *Id.* at 574.

[15] *Id.* at 575-577.

[16] *Ibid.*

[17] *Id.* at 578.

[18] *Id.* at 580.

[19] *Id.* at 581.

[20] *Id.* at 573.