



Hearing on the Constitutionality of the Individual Mandate in the Affordable Care Act

Oral Statement of Steven G. Bradbury before the House Ways and Means Committee, Subcommittee on Health

March 29, 2012

Chairman Herger, Ranking Member Stark, and distinguished Members of the Subcommittee, it's an honor to appear before you today.

I'd like to focus on the economic realities behind the individual mandate, as laid out in an amicus brief we filed in the Supreme Court on behalf of 215 leading economists.

Justice Alito alluded to our brief when he made the following points to the Solicitor General at oral argument this past Tuesday:

Justice Alito noted that the Congressional Budget Office estimates that the average premium for a single health insurance policy in 2016 will be around \$5,800 per year.

He then observed, based on calculations presented in our amicus brief, which were derived from public HHS survey data, that the typical young healthy individual (who is the real target of the individual insurance mandate) incurs on average only \$854 in annual healthcare costs. That's less than one-seventh of the medical costs incurred by the average American per year (a number frequently cited by those defending the mandate). Indeed, just focusing on emergency room costs, the average annual emergency room costs for the young and healthy are only \$56.

Highlighting this dramatic difference between the insurance premium a young healthy individual can be expected to pay in complying with the mandate and the relatively modest healthcare costs that that same individual can be expected to incur, Justice Alito pointed out the obvious:

"[W]hat this mandate is really doing is not requiring the people who are subject to it to pay for the services that they are going to consume[.] It is requiring them to subsidize services that will be received by somebody else."

The very same point was driven home by the *Washington Post*, in its editorial earlier this week supporting the mandate. *The Post* was very candid when it wrote:

“Insurance companies would be unable to offer affordable coverage to those with preexisting conditions ... unless they also were guaranteed enrollment of the young and healthy customers who are less likely to consume healthcare services.”

These economic realities show that the individual mandate has almost nothing to do with cost-shifting in healthcare markets, since the people primarily targeted by the mandate (those who can afford health insurance but who voluntarily choose not to purchase it because they reasonably expect the cost of insurance to outweigh their foreseeable medical costs) account for only a small fraction of the \$43 billion of un-compensated costs identified by the Solicitor General.

Instead, the mandate was actually enacted not to stop cost-shifting, but to compel millions of Americans to pay more for health insurance than they receive in benefits as a means to subsidize the insurance companies, and thereby to mitigate the steep rise in insurance premiums that would otherwise be caused by the guaranteed-issue and community-rating requirements created by the Affordable Care Act itself.

The Act prevents health insurers from making the basic actuarial decisions made in every other insurance market. Insurers may no longer withhold health insurance from those with preexisting conditions or price insurance premiums to match customers’ known actuarial risks.

By requiring health insurers to cover the sick and set premiums based on average costs, these federal requirements would dramatically increase healthcare premiums for all insured Americans, unless Congress at the same time forces the young and healthy with relatively little need for comprehensive health insurance to enter the market on terms that are economically disadvantageous.

Whether or not these regulatory requirements are good policy, what is clear as a constitutional matter is that Congress is not regulating “how health care consumption is financed,” as the Solicitor General has put it, but rather is compelling the voluntarily uninsured to purchase insurance at disadvantageous prices as a quid pro quo to compensate for the enormous costs imposed by the law’s regulatory burdens.

The economic data prove the point, and they belie any claim that the mandate is constitutional on the ground that it “regulates economic conduct with a substantial effect on interstate commerce.”

The mandate is not a regulation of commerce; it’s a forced subsidy meant to ameliorate the costs of Congress’s own regulatory policies.

Thank you, Mr. Chairman.