



PACIFIC LEGAL FOUNDATION
Rescuing Liberty from Coast to Coast

Litigation Backgrounder - Updated September, 2012

The federal government cannot force individuals to buy health insurance

(Sissel v. U.S. Dep't of Health & Human Servs., et al.)

*"The Federal Government does not have the power to order people to buy health insurance."
—Chief Justice John G. Roberts in NFIB v. Sebelius¹*

In early 2010, the federal government enacted the Patient Protection and Affordable Care Act (Act),² which forces every American to purchase government-approved health insurance coverage, or pay a fine.³ This legal requirement to buy health insurance is known as the "individual mandate," and it is the target of a federal lawsuit filed by Pacific Legal Foundation (PLF) on behalf of Iowa entrepreneur Matt Sissel.⁴

In June, 2012, the United States Supreme Court decided *NFIB v. Sebelius*.⁵ That case upheld the constitutionality of some provisions of the Act, while invalidating others. Although several justices wrote opinions in the case, the most important was that of Chief Justice John Roberts. He declared that the Individual Mandate exceeded Congress' power under the Commerce Clause, but he went on to announce what he called a "saving construction" of the Act under which Americans can be required to pay a tax for not obtaining health insurance. Unfortunately, much dispute remains as to the meaning and effect of Chief Justice Roberts' opinion.

On September 11, 2012, attorneys with the Pacific Legal Foundation amended the complaint in Matt Sissel's case to raise new issues in light of the *NFIB* decision.⁶ In this updated litigation backgrounder, we explain this new chapter in PLF's fight for constitutional protections for individual freedom.

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Matt Sissel: opposing the Individual Mandate

After serving for eight years in the Iowa National Guard, including two years as a combat medic in Iraq, Matt Sissel is starting a new career as a professional artist. He recently finished his studies at the Toronto Academy of Realist Art in Canada, where he specialized in realistic painting and portraiture. In August, 2010, he returned home to Iowa City to produce and market his artwork.

Sissel is healthy and current on his medical expenses. He has chosen not to buy health insurance because he wants to be free to invest in his own business instead; and costly insurance premiums aren't worth the money to him. Sissel says he wants the freedom and flexibility to do his own budgeting, including setting aside money for his medical needs as he chooses, without government oversight. "As a small business owner," Sissel says, "I don't need the government telling me how to manage my expenses; they can't even manage their own."

Indeed, the financial implications of the Act are palpable. It has already begun to burden businesses with "more government-mandated paper work, fewer choices in health plans for their employees, and no mechanism to control costs."⁷ Health care is becoming more expensive—the Centers for Medicare and Medicaid Services are reporting that U.S. health spending is projected to grow at an average annual rate of 6.3 percent over the next decade, up from 6.1 percent before the Act took effect.⁸ And one study, performed by researchers at Suffolk University's Beacon Hill Institute, found that the Act could destroy up to 700,000 jobs by 2019.⁹

Yet Sissel's objection to the individual mandate is about more than dollars and cents. He believes that he should be free to live his life without the federal government meddling in his most personal affairs. "I object to being conscripted into a federal health care program," he says. Sissel's fundamental opposition to the individual mandate is rooted in the Constitution's principles of limited government: "My principles, I believe, are the same ones held by our Founding Fathers," says Sissel. "To defend individual freedom, they tried to limit the size of the federal government and what it could do. They could not have conceived of the federal entanglement in people's personal, private choices that the Act represents."

The unconstitutionality of the Individual Mandate

When it was enacted in 2010, the Individual Mandate represented "an unprecedented form of federal action," giving the federal government expansive

control over the health care sector.¹⁰ The Act declared that beginning in 2014, every American must maintain “minimum essential” health insurance coverage.¹¹ Individuals who do not maintain such coverage are subject to hundreds or thousands of dollars in penalties assessed by the Internal Revenue Service.¹² Thus, anyone without health insurance coverage must either purchase it or qualify for a government health insurance plan, or pay a fine.

Specifically, the Act authorizes the U.S. Department of Health and Human Services and the U.S. Treasury to determine what health plans will qualify as minimum essential coverage.¹³ Anyone defined by the Act as an “applicable individual” — which includes almost every American—must be covered under a government-approved plan.¹⁴ With some exceptions for persons of limited means, any individual who fails to maintain minimum essential coverage must pay a fine to the IRS equal to the greater of 2.5 percent of his or her annual income, or \$695 per uninsured family member per year, up to a maximum of \$2,085 per family per year.¹⁵ Because Sissel is an applicable individual under the Act, he is now subject to stiff penalties if he fails to buy health insurance.

In the months following the Act’s passage, dozens of lawsuits were filed to challenge its constitutionality. Among these was Matt Sissel’s. Like many other of these cases, Sissel’s case focused on whether or not the Mandate was a legitimate use of Congress’ power under the Commerce Clause. That provision allows Congress to regulate “commerce with foreign nations, and among the several states, and with the Indian tribes.”¹⁶ Although in a series of cases dating back to the 1930s, the Supreme Court expanded Congress’ Commerce Clause authority, those challenging the Individual Mandate (including the Pacific Legal Foundation¹⁷), argued that the Court had never allowed Congress to *force* people to engage in commerce. On the contrary, even in cases that expanded congressional power far beyond the founders’ designs, the Court had always maintained that there must be some outside limit to federal power under the Commerce Clause—it did not allow the federal government to regulate whatever activity happened to have some economic effect.

In the 1995 case *United States v. Lopez*, the Court struck down a federal law establishing a gun-free zone around public school campuses because, as the Court explained, the law had “nothing to do with ‘commerce’ or any sort of economic enterprise.”¹⁸ The Court refused to “pile inference upon inference” to establish a connection between gun possession in a school zone and interstate commerce.¹⁹ Five years later, in *United States v. Morrison*, the Court invalidated a portion of the federal

Violence Against Women Act, holding that Congress may not regulate non-economic conduct (i.e., rape) based solely on the fact that violent crimes against women had, in the aggregate, economic consequences for the nation as a whole.²⁰ In both *Lopez* and *Morrison*, the Court found that there must be meaningful limits to Congress' commerce power, because "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds."²¹

Yet in the years that followed, some legal scholars argued that the *Lopez* and *Morrison* cases were anomalies in the law, and that the later case of *Gonzales v. Raich*—upholding the constitutionality of federal laws against marijuana—had deprived them of any real effect.²² And many prominent legal academics dismissed arguments against the Individual Mandate as legally frivolous and absurd.²³

The federal government asked the trial court to dismiss Sissel's challenge to the Individual Mandate in the fall of 2010.²⁴ But before the court could decide that motion, the Supreme Court declared that it would review the question in a different case, *NFIB v. Sebelius*, which had originally been filed in Florida. The judge reviewing Sissel's case therefore issued an order putting the case on hold until the High Court issued its ruling.

In March, 2012, the Supreme Court heard three days of oral argument on the constitutionality of the Individual Mandate and other provisions of the Act. The plaintiffs argued that forcing a person to buy a product is not a "regulation" of "commerce," because to "regulate" means to govern activity that is voluntarily undertaken, and "commerce" cannot be used to refer to a person's *failure* to buy something. If Congress can compel a person to engage in activity whenever it has some economic consequence, the result would be an unlimited federal power to do whatever government officials considered worthwhile—and thus the eradication of meaningful limits on federal authority.

Chief Justice Roberts' surprising—and confusing—decision

On the last day of its 2011-2012 term, the Supreme Court issued its decision in *NFIB v. Sebelius*. While four justices would have ruled the entire Act unconstitutional, the decisions of Chief Justice John Roberts and the Court's four liberal justices were more complicated, and the result has been confusion over the actual import of the ruling.

Chief Justice John Roberts wrote a long opinion, part of which was endorsed by the four liberal justices, and part of which agreed with the four conservative justices.

Only those parts of an opinion that garner the support of five justices qualifies as the “opinion of the Court,”²⁵ so that even a single justice’s opinion can be considered the binding law if it is the narrowest reasoning that supports the ultimate judgment in the case.²⁶

Roberts began by declaring that “the Commerce Clause does not support the individual mandate.”²⁷ A law forcing people to buy something “does not regulate existing commercial activity Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority That is not the country the Framers of our Constitution envisioned.”²⁸ Agreeing with the conservative justices, Roberts concluded that while the Commerce power may be broad, it could not justify the Mandate without “fundamentally changing the relation between the citizen and the Federal Government.”²⁹

Nor could the Mandate be justified under the Constitution’s “Necessary and Proper” Clause. “Even if the individual mandate is ‘necessary,’” wrote Roberts, “such an expansion of federal power is not a ‘proper’ means for making those reforms effective” because it would so dramatically weaken the Constitution’s limits on federal power.³⁰

But Roberts chose not to stop there. Instead, in a section of the opinion that was joined by the Court’s four liberal justices, Chief Justice Roberts took another step. In what he called a “saving construction,” Roberts chose “to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.”³¹ Requiring people to pay a tax if they do not purchase insurance was different, he wrote, than forcing people to buy a product. This was for three reasons. First, while the Commerce Clause only allows Congress to regulate activity, the Tax power can be used to tax inactivity.³² Second, Roberts and the four liberal justices viewed the amount of the tax burden at issue as too insubstantial to amount to a command: although in some cases “the penalizing features of [a] so-called tax” might become so severe that it is transformed from a tax into “a mere penalty with the characteristics of regulation and punishment,”³³ the justices believed that the Act did not go so far.

Finally, the justices believed that there is a significant difference between, on one hand, being ordered to buy insurance through a Commerce Clause enactment and, on the other, being taxed for not buying insurance. “The taxing power does not give

Congress the same degree of control over individual behavior” as the Commerce Clause,³⁴ because “imposition of a tax nonetheless leaves an individual with *a lawful choice to do or not do a certain act*, so long as he is willing to pay a tax levied on that choice.”³⁵ Under the taxing power, Congress cannot command behavior, but only the payment of money—and so long as the amount demanded is not so extreme as to really qualify as compulsion, this rule would protect the individual’s freedom of choice: “If a tax is properly paid, the Government has *no power to compel or punish individuals* subject to it.”³⁶

In short, the portion of Chief Justice Roberts’ opinion that garnered the support of the four liberal justices upheld the constitutionality of the Act only by reading it to “do [nothing] more than impose a tax.”³⁷ Although Roberts admitted that this was not “[t]he most straightforward reading of the mandate,” it was what the majority of justices resolved.³⁸

But what does Roberts’ decision really mean?

In a separate opinion written by Justice Ruth Bader Ginsburg, the liberal justices criticized Roberts. Although they agreed with his tax-power theory, they argued that he should not have addressed the Commerce Clause question at all.³⁹ This was a significant point, because normally any part of a legal opinion that is not logically necessary to the ultimate outcome is considered “*obiter dictum*,” meaning that while it may be important and interesting, it is not controlling precedent. Was Roberts’ Commerce Clause opinion merely an “essay,” as Ginsburg claimed, or is it binding law? Is a person actually required to buy insurance or not? Many leading legal scholars also argued that Roberts’ view of the Commerce Clause was merely “*obiter dictum*,”⁴⁰ and that the decision upheld the constitutionality of the Individual Mandate in its entirety.

But Roberts answered Ginsburg’s challenge by declaring that the Act “reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.” If it were “read as a command,” Roberts declared, it would be “unconstitutional” because “[t]he Federal Government does not have the power to order people to buy health insurance.”⁴¹

Such an answer would not be so important if it were not for the fact that the four conservative justices agreed with Roberts that the Mandate was unconstitutional under

the Commerce Clause. They concluded that the Commerce Clause “does not empower the Government to say when and what we will buy,” so that the Act “exceeds federal power.”⁴² Since five justices were in agreement on that point, it, too, qualifies as binding law. Moreover, even the liberal justices signed on to Chief Justice Roberts’ statement in his opinion that “[t]he Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.”⁴³ And since the Supreme Court has long adhered to the rule that in fractured decisions like this one, “the holding of the Court” is “that position taken by those [justices] who concurred in the judgments on the narrowest grounds,” Chief Justice Roberts’ opinion should be regarded as the controlling decision.⁴⁴

Chief Justice Roberts’ opinion declares that the Commerce Clause does not allow the federal government to compel activity, but only allows it to tax people for failing to act—if that tax is low enough that it is not punitive. This means that, so long as people can choose whether to comply or pay the tax, the government can use the taxing power to encourage, not compel, behavior. Whether or not one finds this “saving construction” convincing, one thing is clear: the Constitution does *not* allow the federal government to *force* people to buy insurance.

PLF has therefore amended its complaint in Matt Sissel’s case to argue that under the *NFIB* decision, the Individual Mandate is unconstitutional and Matt Sissel is not required to buy insurance. This presents the trial court—and, later, courts of appeals—with the chance to explain whether or not Chief Justice Roberts’ Commerce Clause opinion is “obiter dictum” and whether under the *NFIB* decision a person is still required to purchase insurance or not.

If the PPACA imposes a “tax,” is that constitutional?

But what about the constitutionality of the Act’s “tax”? The Constitution provides that “all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other bills.”⁴⁵ Yet the Patient Protection and Affordable Care Act—including its monetary penalties for failing to purchase health insurance—did not originate in the House of Representatives.

The founding fathers viewed the Origination Clause as a crucial protection for American freedom.⁴⁶ They thought it important that the power to tax be kept as close as possible to the people’s representatives—members of the House, who are elected every two years by local districts.⁴⁷ This would give the voting public the strongest possible

control over the taxing power, which the founders rightly saw as prone to dangerous abuse.

But as it was drafting the Act in 2010, Congress used a procedural maneuver called a “shell bill,” in which the Senate took a bill that had already been passed by the House, and amended it to strike out all of its language and replace it entirely with new language. The bill—H.B. 3590—began as the “Service Members Home Ownership Act of 2009,” introduced in September, 2009.⁴⁸ That bill was passed by the House and sent to the Senate in October, 2009. But on November 19, 2009, Senate Majority Leader Harry Reid submitted an “amendment” which struck out everything in the bill and replaced it with what became the Patient Protection and Affordable Care Act.⁴⁹ That Act contains 17 separate revenue provisions, including a dozen new taxes estimated to increase federal revenue by \$486 billion by 2019.⁵⁰

Federal courts have reviewed cases involving Origination Clause challenges, but none has ever involved as extreme an example of the strike-and-replace procedure used in passing the Act. In *Flint v. Stone Tracy Co.*,⁵¹ the Supreme Court upheld the constitutionality of a bill in which the Senate had added a tax increase through an amendment to a House bill that had originally eliminated an inheritance tax. And in *Rainey v. United States*,⁵² the Court allowed the Senate to add a tax to a tariff bill that had originated in the House. But in *United States v. Munoz-Flores*,⁵³ a 1990 case, the Court indicated that it would not allow Congress simply to ignore the Origination Clause. “Although the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments.”⁵⁴

PLF has therefore amended its complaint in Matt Sissel’s lawsuit to challenge the constitutionality of the tax on non-compliance, on the grounds that it violates the Origination Clause.

**Pacific Legal Foundation litigates across the nation
to enforce constitutional protections**

Matt Sissel is represented by PLF attorneys Paul J. Beard, Timothy Sandefur, Theodore Hadzi-Antich, Alan DeSerio, and Daniel A. Himebaugh. The lawsuit, *Sissel v. United States Department of Health and Human Services, et al.* (No. 1:10-cv-01263), was filed in the United States District Court for the District of Columbia on July 26, 2010.

PLF (www.pacificlegal.org) is the largest and oldest public interest law firm dedicated to individual liberty, private property rights, and limited government. Established in 1973, PLF is headquartered in Sacramento, California, and maintains offices in Washington and Florida.

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Notes:

1. 132 S. Ct. 2566, 2600-01 (2012) (opn. of Roberts, C.J.).
2. Pub. L. No. 111-148, 124 Stat. 119 (2010). *See also* 26 U.S.C. § 5000A (2010); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1032 (2010); TRICARE Affirmation Act, Pub. L. No. 111-159, 124 Stat. 1123 (2010); Pub. L. No. 111-173, 124 Stat. 1215 (2010).
3. 26 U.S.C. § 5000A (2010).
4. PLF filed Sissel's complaint on July 26, 2010. A copy is available on PLF's website at: <http://community.pacificlegal.org/Document.Doc?id=458>.
5. 132 S. Ct. 2566 (2012).
6. The amended complaint can be read at <http://blog.pacificlegal.org/wordpress/wp-content/uploads/2012/09/Amended-Complaint-9-10-12.pdf>.
7. Roger Stark, MD, *The Impact of the National Health Care Law on Businesses in Washington State 4*, Washington Policy Center, Policy Note (June 2010).

8. Andrea M. Sisko, et al., *National Health Spending Projections: The Estimated Impact of Reform Through 2019*, Health Affairs (Sept. 9, 2010), available at <http://content.healthaffairs.org/cgi/content/full/hlthaff.2010.0788v1> (last visited Sept. 13, 2010).
9. David G. Tuerck, Ph.D., et al., *Killing Jobs Through National Health Care Reform*, Beacon Hill Institute at Suffolk University, BHI Policy Study (Mar. 2010), available at www.beaconhill.org/BHISTudies/HCR2010/BHI-HealthCareReformAsJobKiller10-0317.pdf (last visited Sept. 13, 2010).
10. Michael F. Cannon, *All the President's Mandates: Compulsory Health Insurance Is a Government Takeover*, Cato Institute, Briefing Paper No. 114 (Sept. 23, 2009), available at <http://www.cato.org/pubs/bp/bp114.pdf> (quoting U.S. Congressional Budget Office, "The Budgetary Treatment of an Individual Mandate to Buy Health Insurance," *CBO Memorandum 1* (Aug. 1994), available at <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf>. (last visited Sept. 13, 2010)).
11. 26 U.S.C. § 5000A (2010).
12. *Id.*
13. *Id.* § 5000A(f)(1)(E) (2010).
14. *Id.* § 5000A(d) (2010). The Act excludes from the definition of "applicable individual" Americans living abroad, *see* 26 U.S.C. § 5000A(f)(4), those who are incarcerated, and individuals who qualify for a religious conscience exemption.
15. *Id.* § 5000A(e) (2010). Applicable individuals who fail to maintain "minimum essential coverage" are exempt from the penalty if they are suffering financial hardship, are American Indians, have been without coverage for less than three months, are individuals for whom the lowest available insurance option exceeds eight percent of household income, or are individuals whose incomes are below the tax filing threshold.
16. U.S. Const. art. I, § 8, cl. 3.
17. Aside from the *Sissel* case, Pacific Legal Foundation filed ten friend of the court briefs in various cases challenging the constitutionality of the Mandate, arguing among other things that it was unconstitutional under the Commerce Clause.
18. *United States v. Lopez*, 514 U.S. 549, 561 (1995).
19. *Id.* at 567.

20. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).
21. *Id.* at 608.
22. See, e.g., A. Christopher Bryant, *The Third Death of Federalism*, 17 Cornell J.L. & Pub. Pol'y 101, 154-55 (2007) (citing sources).
23. See, e.g., Akhil Reed Amar, *Constitutional Showdown*, L.A. Times, Feb. 5, 2011.
24. See Luke Wake, *Government seeks to dismiss Sissel's challenge to the health care mandate*, PLF Liberty Blog, Nov. 15, 2010, available at <http://plf.typepad.com/plf/2010/11/government-seeks-to-dismiss-sissels-challenge-to-health-care-mandate.html>. The pleadings relating to this motion can be found at <http://www.pacificlegal.org/page.aspx?pid=1341>.
25. *Marks v. United States*, 430 U.S. 188, 193 (1977).
26. See *United States v. Williams*, 435 F.3d 1148, 1157 n.9 (9th Cir. 2006).
27. *Sebelius*, 132 S. Ct. at 2593.
28. *NFIB*, 132 S. Ct. at 2587-89 (opn. of Roberts, C.J.).
29. *Id.* at 2589 (opn. of Roberts, C.J.).
30. *Id.* at 2592 (opn. of Roberts, C.J.).
31. *Id.* at 2593 (opn. of the Court).
32. *Id.* at 2599 (opn. of the Court).
33. *Id.* at 2600 (opn. of the Court) (quoting *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994)).
34. *Id.* (opn. of the Court).
35. *Id.* (opn. of the Court) (emphasis added).
36. *Id.* (opn. of the Court) (emphasis added).
37. *Id.* at 2598 (opn. of the Court).
38. *Id.* at 2593 (opn. of the Court).

39. *Id.* at 2528-29 (opn. of Ginsburg, J.)

40. *See, e.g.*, Steven D. Schwinn, *Did Chief Justice Roberts Craft A New, More Limited Commerce Clause?*, Constitutional Law Prof Blog, June 29, 2012, available at <http://lawprofessors.typepad.com/conlaw/2012/06/did-chief-justice-roberts-craft-a-new-more-limited-commerce-clause.html>; Jack M. Balkin, *Early Thoughts on The Health Care Case*, Balkinization, June 28, 2012, available at <http://balkin.blogspot.com/2012/06/early-thoughts-on-health-care-case.html>.

41. *NFIB*, 132 S. Ct. at 2600-01 (opn. of Roberts, C.J.).

42. *Id.* at 2648 (dissenting opinion).

43. *Id.* at 2599 (opn. of the Court).

44. *Marks*, 430 U.S. at 193 (citation and quotation marks omitted).

45. U.S. Const. art. I § 7.

46. James v. Saturno, *The Origination Clause of The U.S. Constitution: Interpretation and Enforcement*, Congressional Research Service, Mar. 15, 2011, available at <http://www.fas.org/sgp/crs/misc/RL31399.pdf>.

47. Before the Seventeenth Amendment was passed, Senators were not elected by the people at all, but by state legislatures (or by the people as a matter of state law).

48. The original bill can be read at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3590ih/pdf/BILLS-111hr3590ih.pdf>.

49. *Congressional Record*, 111th Cong. S11607 (2009).

50. Letter from Congressional Budget Office to Sen. Harry Reed, Nov. 18, 2009, available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/107xx/doc10731/reid_letter_11_18_09.pdf.

51. 220 U.S. 107 (1911).

52. 232 U.S. 310 (1914).

53. 495 U.S. 385 (1990).

54. *Id.* at 392.

