Written by **Bob Adelmann** on March 20, 2012

White House Shifts Legal Gears as ObamaCare Heads to Supreme Court

The pressure of the continuing countdown to Monday, March 26, when the Supreme Court takes on the challenge to ObamaCare, has forced legal advisors to the White House to change their strategy in hopes of successfully rebuffing it and preserving the Obama administration's key legislative victory signed into law in March, 2010.

It's all about the mandate and whether it can be sustained by claiming justification for it under a generous reading of the Commerce Clause (Article 1, Section 8, Clause 3) in the Constitution. Without that mandate, the administration claims that the rest of the law would necessarily fail due to its excessive costs. The Congressional Budget Office just reported that those costs would be double what the Obama administration touted in its cram-down of the law two years ago. And another CBO study said that, if implemented, millions of citizens — between 3 million and 20 million — would actually lose their present coverage, while public polls continue to show declining support for the whole idea of the federal government's virtual takeover of the country's health delivery system.

An *ABC News/Washington Post* poll taken in January showed that most of those polled think that ObamaCare, if implemented, will cost jobs, hurt the economy, and cost more than projected. Last week's poll from the same source showed that two-thirds of those polled "say the U.S. Supreme Court should throw out either the individual mandate…or the law in its entirety." According to the pollsters, "[T]he law has never earned majority support in *ABC/Post* polls — and this update…finds a strong sense its critics are dominating the debate. Seventy percent of Americans report hearing mainly negative things about the law…"

Another measure of the intensity surrounding the pending Supreme Court hearings (a record six hours are scheduled over three days next week) is the number of "amicus" or "friend of the court" briefs that have been submitted by parties who are interested in influencing the outcome of a lawsuit but who are not parties to it. Reuters reported that 136 briefs have been filed with the court (a stack about two feet high), a third more than the previous record number filed back in 2003 over an affirmative action lawsuit involving the University of Michigan.

The change in strategy moves the defense of ObamaCare away from the Commerce Clause and directs it instead to the Necessary and Proper Clause (Article 1, Section 8, Clause 18) of the Constitution, which reads:

> The Congress shall have Power — To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The argument goes like this: Because it's [allegedly] proper for the government to reform the interstate market in health insurance by requiring insurance companies to cover everyone regardless of health status without charging higher premiums, then it follows that the mandate forcing participation is "necessary and proper" to keep the additional costs that regulation would cause from bankrupting the country.

The White House recognizes the reality that they have four justices likely to support ObamaCare, and four who are likely to rule against it, leaving one — Justice Antonin Scalia — in the middle. In a previous case, *Gonzales v. Raich*, Scalia noted in a separate opinion that the federal government could prevent people from growing their own medical marijuana as a "necessary and proper" way of carrying out the government's broader power to criminalize drug usage. Such a claim, using Scalia's own argument, is giving the White House the opening it needs to keep Scalia in line, remain consistent and force him to side with the administration on the matter.

With so much attention about to be directed to the Supreme Court's hearings next week, it is going to be hard for the court to avoid offending someone. If ObamaCare is upheld, the Supremes suffer in the court of public opinion. If ObamaCare is ruled unconstitutional, the Obama administration will suffer a grievous, perhaps fatal, blow to its reelection efforts.

Of course, analysts have pointed out that the court just may find a way to delay making any decision at all until after the election, thereby offending everyone and confirming for observers that the rule of law no longer matters and that the federal government is free to do whatever it pleases in disregard of the Constitution altogether.