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Supreme Court Hears Oral Arguments on Health Care Reform: Will the Affordable Care Act Survive?

By Ilyse Schuman and Russell Chapman

After three days of oral arguments last week, the fate of the Patient Protection and Affordable Care Act (ACA) now lies in the hands of the nine Supreme Court justices. What, if any, provisions of the sweeping health care reform law will survive remains very much in question after the historic arguments. The questioning revealed deep divisions within the Court about the constitutionality of the law's so-called "individual mandate" and whether the rest of the Act should stand if the mandate is struck down. Even after the Supreme Court renders its decision, which is expected in June, the debate over the landmark legislation likely will continue for years to come.

Background

Almost as soon as the ACA was enacted, lawsuits were filed challenging its constitutionality. At the heart of all of the challenges is the question of whether Congress has the power to compel an individual to purchase insurance or pay a penalty. Beginning in 2014, the ACA requires almost all individuals to obtain health insurance or pay a penalty. Four federal appellate courts have considered this question. The U.S. Courts of Appeal for the D.C. Circuit and the 6th Circuit determined that the individual mandate was valid, while the 11th Circuit came to the opposite conclusion, finding that Congress exceeded its authority in enacting that provision. The 4th Circuit dismissed two lawsuits challenging the ACA's constitutionally on technical grounds. In one case the court found that the action was barred by the Anti-Injunction Act (AIA), while in the other it dismissed the lawsuit on the ground that the Commonwealth of Virginia lacked standing to sue in the first place, as the provision had not yet taken effect.

The Supreme Court agreed to review the challenges brought by the Attorneys General of 26 states and by the National Federation of Independent Business[1] on the following four issues:

- Does the Anti-Injunction Act bar challenges to the individual mandate?
- Whether the Affordable Care Act's provisions requiring virtually all individuals to obtain health insurance or pay a penalty as of 2014 – commonly referred to as the law's "individual mandate" – is constitutional. Specifically, in enacting the individual mandate, did Congress exceed its enumerated powers under the Constitution?
- If the individual mandate is unconstitutional, do the remaining portions of the law still stand,

should the Court also strike those portions of the law that it deems to be directly dependent on the individual mandate, or is the entire law rendered invalid because it is non-severable?

- Is the law's expansion of the Medicaid program constitutional?

Notably, the Court did not agree to specifically address whether the Affordable Care Act's employer mandate is legitimate. As of 2014, the law's shared responsibility provisions – also known as the "pay or play" mandate – will require employers with 50 or more employees to provide affordable, minimally essential health coverage to their full-time employees or pay a penalty. Instead, the Court will focus on the law's individual responsibility provisions.

Anti-Injunction Act

Whether the controversial individual mandate contained in the new health care law can even be challenged at this time was the subject of debate during the first day of oral argument. Specifically, the question is whether the Anti-Injunction Act – which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person" – bars the individual mandate challenge because no individual penalty has yet been assessed. While it seems unlikely, if the Court were to ultimately decide – as the Fourth Circuit did in *Liberty University v. Geithner* – that the penalty is a tax and the AIA applies, a lawsuit challenging the individual mandate would not ripen until 2015 as that is the earliest date that the IRS could assess a penalty against those who do not obtain health insurance.

The tone of the questioning indicated that the Court is not inclined to punt the issue on this basis for another three years. Both sides in the case at issue, *Department of Health and Human Services v. Florida*, argued that the AIA does not apply in this matter, and that the Court has jurisdiction to decide this case now. Attorney Gregory Katsas, arguing on behalf of 26 state attorneys general, the National Federation of Independent Business and four private individuals, and Solicitor General Donald Verrilli Jr., who represents the government, both asserted that the individual mandate is enforced by a penalty, not a tax, and is therefore not subject to the AIA.

Because both parties in this case were in agreement on the AIA issue, the Court appointed attorney Robert Long to argue that the statute does, indeed, apply in this matter. Among his arguments in favor of applying the AIA is that the penalty – which is calculated as a percentage of the individual's income and paid to the IRS – "bears the key indicia of a tax."

Some of the justices did not seem persuaded by this argument. Since the general intent of the AIA is to ensure that the government can collect the revenues it needs to function without the delay of lawsuits, some expressed doubt that the individual mandate penalty would serve this purpose. According to Justice Ginsburg, the purpose of the ACA's penalty is not to raise revenue. She explained that the AIA "does not apply to penalties that are designed to induce compliance with the law rather than to raise revenue. And this [the individual mandate] is not a revenue-raising measure, because, if it's successful . . . nobody will pay the penalty and there will be no revenue to raise." Justice Scalia also seemed reluctant to postpone consideration of the matter on jurisdictional grounds. He noted that the Court generally construes limitations on jurisdiction narrowly.

Among other reasons why the penalty is not a tax for AIA purposes, Solicitor General Donald Verrilli Jr. argued that "there . . . needs to be textural instruction in the statute that this penalty should be treated as a tax for Anti-Injunction Act purposes, and that's what is lacking here." Verrilli, however, argued that while the penalty was not a tax for AIA purposes, the individual mandate was nonetheless within Congress's taxing authority.

The justices generally appeared reluctant to relinquish jurisdiction over this matter, and it seems unlikely that a decision on the ACA's constitutionality will be deferred based on the AIA.

Individual Mandate

The second day of oral argument addressed the most critical question of whether the individual mandate is constitutional. The individual mandate, or minimum coverage provision of the ACA, provides that beginning in 2014 non-exempted federal income taxpayers who fail to maintain a minimum level of health insurance for themselves or their dependents will owe a penalty. The key question debated was whether this individual mandate provision is a valid exercise of Congress's power to regulate commerce, or whether – as some justices seemed to suggest – it amounts to an unconstitutional legislative overreach.

According to the administration, the individual mandate falls within Congress's authority to regulate interstate commerce. The government contends that the national health care market was facing a growing economic crisis, which the ACA's enactment was designed to address. The crux of the argument in favor of the individual insurance mandate is by refusing to participate in the purchase of insurance, the uninsured will wreak havoc on the health care market by shifting costs and insurance risks to those who do purchase insurance. Thus, the minimal essential coverage requirement is a vital part of comprehensive health care market reform, as it regulates economic conduct with a substantial effect on interstate commerce.

The government also argued that the individual mandate falls within the Necessary and Proper clause, which provides that 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." In addition, the government argues that Congress's s broad taxing power extended to the individual mandate, although it was not labeled a tax.

The Solicitor General fielded pointed questions about the limits of Congress's power to regulate individual decision-making. Although some proponents of the legislation and court watchers may have expected more widespread support on the Court for the constitutionality of the mandate, the Solicitor General faced harsh questioning from Chief Justice Roberts, Justices Scalia and Alito, as well as Justice Kennedy – the expected swing vote. Although Justice Thomas did not ask any questions, he is widely expected to oppose the mandate.

Justice Kennedy asked Verrilli whether the government "can create commerce in order to regulate it?" In response, Verrilli stated that "what is being regulated is the method of financing health, the purchase of health care. That itself is economic activity with substantial effects on interstate commerce." Justice Kennedy seemed also to be of the mind that the government bears a heavy burden in justifying such a substantial involvement in an individual's purchases: "when you are changing the relation of the individual to the government in this, what we can stipulate is, I think, a unique way, do you not have a heavy burden of justification to show authorization under the Constitution?" He also sought clarification on the limits of the Commerce Clause. "The reason this is concerning, is because it requires the individual to do an affirmative act."

Justice Scalia appeared to disagree with Verrilli's arguments, particularly about the regulation of the health insurance market: "You're not regulating health care. You're regulating insurance." When Verrilli explained that the purchase of health care is unique in that all individuals eventually avail themselves of the health care system at some point, Justice Alito chimed in: "Do you think there is . . . a market for burial services?" Verrilli explained that the difference between the two markets is that with health care Congress is addressing "the many billions of dollars of uncompensated costs [that] are transferred directly to other market participants." Justice Alito seemed unconvinced by this argument, as did Chief Justice Roberts.

Many of the justices' questions concerned a quest for a "limiting principle" that would distinguish the buying of health insurance from other ordinary individual buying decisions. At one point, the Chief Justice questioned whether any limits were to remain if the Court accepted the administration's position. "Once you're – once you're in the interstate commerce and can regulate it, pretty much all bets are off," Roberts stated. With multiple references to government-mandated broccoli eating, the Solicitor General was pressed to articulate a limiting principle to the extent of Congress's reach under the Commerce Clause should the Court accept the government's position.

However, the more liberal members of the Court, Justices Ginsburg, Breyer, Sotomayor and Kagan, voiced support for the government's position. Justice Ginsburg, for example, appeared to support the idea that the health insurance market is unique and justifies regulation: "what was unique about this is it's not my choice whether I want to buy a product to keep me healthy, but the cost that I am forcing on other people if I don't buy the product sooner rather than later."

Those who posit that the individual mandate is unconstitutional argue that the Commerce Clause governs economic activity, not inactivity, which is what the failure to purchase insurance amounts to. Former Bush administration Solicitor General Paul Clement, who represents 26 state attorneys general in their challenge to the ACA, began his argument by stating that the individual mandate is an "unprecedented effort by Congress to compel individuals to enter commerce in order to better regulate commerce." Justice Kagan disagreed with Clement's contention. She stated that "health insurance exists only for the purpose of financing health care. The two are inextricably interlinked. We don't get insurance so that we can stare at our insurance certificate. We get it so that we can go and access health care." Clement also countered the government's position that the penalty is a "tax." However, even if it were deemed a tax, Clement argued that it would be a forbidden direct tax.

Finally, attorney Michael Carvin, representing the National Federation of Independent Business and four private individuals, argued that: "Congress does not have the power to promote commerce. . . . Congress has the power to regulate commerce. And if the power exceeds their permissible regulatory authority, then the law is invalid."

At the end of the second day of debate, it appeared that the individual mandate may have failed to garner the necessary support of five justices. However, Justice Kennedy provided some encouragement to supporters of the ACA by seeming to acknowledge the unique character of the health insurance market:

> And the government tells us that's because the insurance market is unique. And in the next case, it'll say the next market is unique. But I think it is true that if most questions in life are matters of degree, in the insurance and health care world, both markets — stipulate two markets — the young person who is uninsured is uniquely proximately very close to affecting the rates of insurance and the costs of providing medical care in a way that is not true in other industries. That's my concern in the case.

Given this comment by Justice Kennedy, speculation regarding the impending death of the individual mandate may be premature.

Severability

If the individual mandate provision is deemed unconstitutional, which parts – if any – of the law can survive without it? The question of severability, which was covered on the last day of oral arguments, took on added importance following the tenor of the prior day's debate. During the morning session, Clement argued that if the individual mandate is removed from the law, the remainder falls. According to Clement, the mandate is integral to the entire health care law:

> the individual mandate, guaranteed-issue, and community rating together are the heart of this Act. They are what make the exchanges work. The exchanges in turn are critical to the tax credits, because the amount of the tax credit is key to the amount of the policy price on the exchange. The exchanges are also key to the employer mandate, because the employer mandate becomes imposed on an employer if one of its employees gets insurance on the exchanges. But it doesn't stop there.

Thus, if the mandate is struck down, Clement advocates that Congress be given "a clean slate."

Justice Sotomayor seemed unconvinced by this "clean slate" approach. According to her, Congress would be in a better position to restructure the law: "What's wrong with leaving it . . . in the hands of the people who should be fixing this, not us? Why don't we let Congress fix it?" Justice Kagan also appeared to support the idea that other portions of the law could survive the individual mandate: "It seems to me that if you look at the text, the sharp dividing line is between guaranteed-issue and community ratings on the one hand, everything else on the other."

Justice Ginsburg also seemed amendable to this idea, saying that a "salvage job" is preferable to a "wrecking operation."

Given his perceived disfavor of the individual mandate, Justice Scalia framed the question of severability accordingly: "The whole issue here is whether these related provisions have been legitimately enacted, or whether they are so closely allied to one that has been held to be unconstitutional that they also have not been legitimately enacted."

Deputy Solicitor General Edwin Kneedler, advocating on behalf of the government, argued that in the event the individual mandate is ruled unconstitutional, most of the law should stand. He claimed, however, that certain provisions would not be sustainable without the individual mandate: the requirement that insurers cover pre-existing conditions, and the requirement that they not charge higher premiums for individuals with health problems (the guaranteed issue and community-rating provisions). Kneedler cited the fact that many provisions of the law have already been implemented as an indication that Congress would not have intended the entire law to fall without the individual mandate. "[T]he notion that Congress would have intended the whole Act to fall if there couldn't be a minimum coverage provision is refuted by the fact that there are many, many provisions of this Act already in effect without a minimum coverage provision." Kneedler emphasized that it should be left up to Congress to decide how to rework the law should the mandate be ruled unconstitutional.

At one point Justice Kennedy suggested that leaving certain portions intact could be considered a greater exercise of judicial power than striking the entire law:

> We would be exercising the judicial power if one . . . provision was stricken and the others remained to impose a risk on insurance companies that Congress had never intended. By reason of this Court, we would have a new regime that Congress did not provide for, did not consider. That, it seems to me can be argued at least to be a more extreme exercise of judicial power than . . . striking the whole.

The Court appointed lawyer H. Bartow Farr III to present the argument that all of the remaining provisions could survive the loss of the individual mandate. According to Farr, "severability is by necessity a blunt tool. The Court doesn't have, even if it had the inclination, doesn't essentially have the authority to retool the statute."

Medicaid Expansion

During the final session, the parties debated the extent to which Congress may dictate the terms and conditions attached to federal dollars, which could have broader implications on other federally-funded programs. Clement, who once again represented the 26 states in their lawsuit, argued that the ACA's expansion of the Medicaid program exceeds Congress's limits. Specifically, the ACA will require states to cover approximately 16 million more low-income people under Medicaid in 2014. For the first year of this expansion, the federal government will cover 100 percent of the cost of the new enrollees. This subsidy will gradually taper off until 2020, where it will stay at 90 percent. States are protesting that Congress is overstepping its legislative authority in requiring states to enroll more people in the program as a condition of receiving federal funds. Although the Medicaid program is voluntary, the states argue that since Medicaid funding is the largest source of funding provided to states, failing to participate is not a viable option, and therefore attaching conditions to such large funding is unduly coercive.

During the beginning of this argument, Justice Kagan voiced her skepticism of this position, as did Justice Ginsburg. Justice Breyer brought up the point that the government has expanded the Medicaid program several times throughout its 45-year history. Clement replied that one distinguishing factor of the current expansion is its sheer scale. He also contended that the expansion is coercive because "this statute uniquely is tied to an individual mandate which is decidedly nonvoluntary." Justice Sotomayor questioned where the line is appropriately drawn between coercive and noncoercive Congressional initiatives.

Justice Scalia seemed similarly unconvinced about how the states were defining coercive: "Your theory . . . is that to determine whether something is coercive, you look to only one side, how much you're threatened with losing or offered to receive. And the other side doesn't matter. I don't think that's realistic."

Solicitor General Verilli argued that since Medicaid is a voluntary program, states are free to opt out of the program if they so choose, and that Congress has the power to attach conditions to federal spending "in order to further federal policy objectives." He began his argument by stating that the states in this case "are asking this Court to do something unprecedented" by seeking a declaration that Congress's use of its Spending Clause power to expand the Medicaid program is "an impermissibly coercive exercise." Several of the justices pressed Verrilli to come up with a scenario that he believed would be considered a coercive use of Congress's spending power, which he was unable to do. By the same token, Justice Scalia asked him whether he could envision a state declining to participate in the Medicaid expansion: "Can you conceive of a State saying no? And . . . if you can't, that sounds like coercion to me."

Verrilli concluded his argument with an impassioned plea for the Court to uphold the ACA in its entirety:

> [the ACA] is something about which the people of the United States can deliberate and they can vote, and if they think it needs to be changed, they can change it. . . . this was a judgment of policy, that democratically accountable branches of this government made by their best lights, and I would encourage this Court to respect that judgment and ask that the Affordable Care Act, in its entirety, be upheld.

What's Next?

Whether the Court will heed the Solicitor General's plea to uphold the law in its entirety, or instead strike it down, or leave "half a loaf" will not be known for several more months. As the Court commences its secret deliberations, the prospect of a majority of justices agreeing to strike

the individual mandate, if not the entire law, is not as remote a possibility as it appeared to be when the lawsuits were first filed. Although any prediction of the outcome of the Supreme Court case is mere conjecture, the debate may entice some employers, health care providers and other stakeholders to prematurely abandon their preparation for ACA implementation. While a great deal of uncertainty about the future of health care reform exists, many provisions are currently in effect and new obligations, such as the summary of benefits and coverage requirements, are fast approaching. Therefore, compliance with existing requirements, and planning and preparation for future changes, should continue. The Supreme Court will provide the last word on the constitutionality of the Affordable Care Act this summer. However, the debate over the future of our health care system may have only just begun.

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[1] The petitions granted review were: National Federation of Independent Business v. Sebelius (11-393); *Department of Health and Human Services v. Florida* (11-398); and *Florida v. Department of Health and Human Services* (11-400).