

U.S. Supreme Court Upholds the Affordable Care Act: Roberts Rules?

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Today, the U.S. Supreme Court issued its decision upholding the Patient Protection and Affordable Care Act of 2010 (the "ACA" or "Act"). The decision marks the culmination of a legal battle and public debate that began soon after the ACA was enacted. The Court upheld the individual mandate, perhaps the most controversial provision of the ACA, but limited the expansion of Medicaid under the ACA. All provisions of the ACA will continue to be in effect, with some limits on the Medicaid expansion. In order to prevent a constitutional violation due to the Medicaid expansion portion of the ACA, the Court held that the Secretary of the Department of Health and Human Services ("Secretary") is not permitted to apply §1396c of the Act to withdraw existing Medicaid funds to a state for failing to comply with the requirements set out in the expansion provisions. Though today's decision will have far-reaching effects in political discourse, the Court emphasizes its deference to Congress and its sensitivity to its judicial role: "We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions."

Key points from decision:

- Individual mandate not supported by Commerce Clause or Necessary and Proper Clause
 - Individual mandate must be construed as a tax, which is upheld under Congress's taxing power
 - Expansion of Medicaid program constitutional, but HHS may not penalize states that choose not to participate in the expansion of Medicaid
 - Decision strikes a balance between principles of federalism and judicial restraint
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I. Background

On March 23, 2010, President Obama signed the ACA into law. The 2700-page Act contained numerous provisions that, when implemented, would alter the health insurance and health care delivery systems in the United States more significantly than any federal law since the creation of the Medicare and Medicaid programs in 1965. Significant ACA provisions include the expansion of coverage under federal health care programs, such as Medicaid; the creation of new programs to integrate and reform health care delivery, such as the Medicare Shared Savings Program; and the minimum coverage provision at §1501 of the ACA that requires, with limited exceptions, individuals to maintain minimal essential health care coverage as of 2014 (commonly referred to as the "individual mandate") or make a "shared responsibility payment". After the enactment of the ACA, individuals, organizations, and 26 states brought suit against the federal government alleging, among other things, that the individual mandate and Medicaid expansion were unconstitutional. After multiple federal appeals court decisions with diverging opinions, the Supreme Court granted review.

This article will discuss the four main issues at play during the oral arguments, highlights of the Court's decision, and implications of the Court's decision.

II. The Issues At Play

In March 2012, the Supreme Court heard three days of oral arguments focusing on four issues: (1) whether the Court could even hear arguments about the constitutionality of the ACA; (2) whether the individual mandate was unconstitutional; (3) if so, whether the individual mandate, and potentially other provisions of the ACA, could be "severed" from the remaining portions; and (4) whether the Medicaid expansion provisions of the ACA were constitutional.

1. Could the Supreme Court Even Hear the Case?

Before the Court addressed the constitutionality of the individual mandate and Medicaid expansion, the Court determined that the Anti-Injunction Act ("AIA") did not apply to the lawsuits challenging the ACA. Under the AIA, courts may not hear lawsuits that attempt to restrain the imposition or collection of a tax. If the AIA did apply to the ACA lawsuits, the Court would have been prevented from hearing the case until the parties had exhausted other remedies.

The Court held that the AIA did not prevent the Court from hearing the challenge to the individual mandate because the mandate is not a "tax" for purposes of the AIA. This decision is not surprising given that during oral argument, the Court expressed skepticism about whether the AIA applied to the case and whether the case could be considered an exception to the AIA.

Today's decision is interesting in that it distinguishes between whether a law is a "tax" for purposes of Congress's taxing power versus the Court's jurisdiction under the AIA. The government argued that the mandate was not a tax for purposes of the AIA but that it was a tax for purposes of Congress's constitutional authority. At oral argument, Justice Alito noted to the Solicitor General "[t]oday you are arguing that the penalty is not a tax. Tomorrow you are going to be back and you will be arguing that the penalty is a tax." Justice Scalia also questioned the Solicitor General regarding the labeling of the mandate as a "penalty" rather than a "tax": "The President said it wasn't a tax, didn't he?"

Despite these exchanges, Chief Justice Roberts ultimately focused on whether Congress intended for the AIA to apply. The Court agreed with the government and held that Congress's decision to describe the shared responsibility payment in §5000A(b)(a) as a "penalty" and not a "tax" demonstrates that Congress did not intend for the AIA to prohibit jurisdiction.

2. Is the Individual Mandate Constitutional?

The central issue in the case was whether Congress had the power under the Constitution to mandate that individuals purchase health insurance and assess a tax or penalty against those individuals who refuse or fail to purchase such insurance. As a general principle of the U.S. federalist system, the federal government may only pass laws under those powers that are enumerated in the Constitution, such as the Commerce Clause. All other powers remain with the individual states. The ACA lawsuits challenged the individual mandate as an unconstitutional use of the Commerce Clause.

The Court telegraphed its skepticism with the Commerce Clause justification during oral argument in March. The justices questioned whether the government was "creating commerce" and whether the penalty associated with the individual mandate was actually a proper exercise of the taxing power.

In a 5-4 decision (with Justices Ginsburg, Breyer, Sotomayor, and Kagan joining Chief Justice Roberts), the Court concluded that the individual mandate was constitutional and could be upheld under Congress's taxing power as the imposition of a tax on those who do not have insurance. However, the individual mandate could not be sustained under the Commerce Clause or the Necessary and Proper Clause.

- "Creating" Commerce.

A key issue involved whether Congress was creating commerce by requiring individuals to purchase health insurance. During oral argument, Justice Kennedy questioned the government on whether it could "create" commerce by requiring an individual to perform an affirmative act and then regulate that act under the Commerce Clause. The government argued that health care is unique since nearly all persons will be in the health care market at some point, many times the choice to be in the market is uncontrollable and unpredictable, and the result of being uninsured shifts costs to the insured.

In today's opinion, the Court emphasized that Congress's broad power to regulate commerce "presupposes the existence of commercial activity to be regulated." Roberts noted that the mandate creates activity to "compel individuals to *become* active in commerce by purchasing a product" rather than regulating existing commercial activity. Consequently, the individual mandate cannot be upheld under the Commerce Clause.

The dissent also rejected the use of the Commerce Clause to support the constitutionality of the individual mandate. Justice Scalia wrote "[t]he Federal Government can address whatever problems it wants but can bring to their solution only those powers that the Constitution confers, among which is the power to regulate commerce... Article I contains no whatever-it-takes-to-solve-a-national-problem power."

- Necessary and Proper Clause.

The Court also assessed whether the individual mandate was constitutional under Congress's power under the Necessary and Proper Clause because the mandate was integral to the guaranteed issue and community rating provisions of ACA. The Court rejected the government's argument, concluding that this would give Congress the "extraordinary ability" to create the predicate necessary to the exercise of its power.

- Is the Individual Mandate Actually a Tax?

Despite holding that the Commerce Clause and the Necessary and Proper Clause do not support the constitutionality of the individual mandate, the Court found that the mandate could be sustained under Congress's taxing power. The Court held that "Congress had the power to impose the exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax. That is sufficient to sustain it." Consequently, while the ACA's description of the shared responsibility payment as a "penalty" and not a "tax" is "fatal" to the application of the AIA, Congress's choice of words does not "control whether an exaction is within Congress's constitutional power to tax." Instead, the "mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS."

The Court then offered a straightforward analysis of its taxing power: "[t]hose subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they many not lawfully do is not buy health insurance and not pay the resulting tax."

Justices Ginsburg, Breyer, Sotomayor, and Kagan joined Justice Roberts's majority opinion holding the mandate constitutional under Congress's taxing power. The Court's liberal justices would have held the individual mandate constitutional under the Commerce Clause as well, but avoided issuing a concurring opinion that would support a constitutional differentiation but make no practical difference in the implementation of ACA.

Justice Scalia's dissent is also not surprising, as it echoes his comments at oral argument. The dissent notes, "[w]hat is absolutely clear... is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct... Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct..."

3. Is the Individual Mandate Severable from the Rest of the ACA?

When a statute or law is held unconstitutional, the Court may eliminate certain provisions of the statute (severing it) or strike the entire statute. At issue with regard to the severability issue was whether other ACA provisions could and/or should be severed from the individual mandate provision if the individual mandate was found unconstitutional. Since the individual mandate was found constitutional, the Court did not address the severability of other ACA provisions.

4. Is Medicaid Expansion Under the ACA Constitutional?

Perhaps the most unexpected component of today's decision is the limitation imposed on the ACA's Medicaid expansion. Medicaid funds medical care for needy individuals through a federal and state partnership under which the federal government provides matching funds to states that agree to comply with federal requirements. Congress may change Medicaid requirements, and participating states must amend state Medicaid plans to comply with changes in federal law. Under the ACA, Congress expanded Medicaid eligibility to certain individuals under age 65 who do not receive Medicare and who have an income up to 133% of the federal poverty level. The ACA requires states to provide limited Medicaid coverage to these newly eligible individuals beginning in 2014. Funding of the expansion will not follow traditional matching guidelines; instead 100% of the expansion will be paid for by the federal government through 2016, with the federal share decreasing to 90% by 2020.

Congress's authority under the Constitution includes spending funds, and setting conditions on the spending of those funds, in order to promote the general welfare. However, Congress's spending power is limited such that it cannot use the power to compel states to adopt federal policies. At issue was whether the ACA unconstitutionally compels states to expand Medicaid by making expansion of Medicaid eligibility a requirement for receipt of federal Medicaid funds despite increased federal funding to subsidize the expansion.

The majority concluded that the Medicaid expansion is constitutional. However, the Court held that it would be an unconstitutional expansion of Congress's authority under the Spending Clause for the federal government to withhold Medicaid funding to the states for non-compliance with the ACA's expansion provisions. Writing for the Court, Chief Justice Roberts noted that "Nothing in our opinion precludes Congress from offering funds under the ACA to expand the availability of health care, and requiring that states accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding."

Rather than invalidate the Medicaid expansion in its entirety, the Court adopted a more limited remedy of severing the penalty provisions from the ACA. Section 1396c gives the Secretary the authority to withhold *all* further Medicaid payments to the state if the Secretary determines the state is out of compliance with any Medicaid requirement, including those contained in the expansion. The Court ruled that the Secretary could not use this section to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion. However, §1396c remains applicable to the existing Medicaid program, and it could be used by the Secretary to withdraw funds provided under the ACA if a state that has chosen to participate in the expansion fails to comply with the requirements of the ACA.

III. Impact of the Decision

Whether denominated as a mandate or a tax, the Court's validation of Section 1501 avoids much of the uncertainty that would have resulted if the ACA was struck down. Providers may proceed, for now, with the assumption that the ACA will reduce the burden of providing care to uninsured and underinsured individuals. The Court's ruling also relieves providers of the need to re-think, or undo, other operational and strategic planning that was implemented under the ACA, such as the move away from fee-for-service to value-based and quality-based reimbursement in an accountable care environment; bundling; bonuses; incentives for various ACA initiatives in areas such as electronic medical records, public health, preventive care, and others; physician quality reporting initiatives; requirements for tax-exempt hospitals such as community health needs assessments, financial assistance, and billing and collection policies; and many other areas of the ACA that might have collapsed with the whole ACA house of cards if the ACA had been struck down in its entirety. Hospital stocks surged ahead on the initial news of the Court's decision while insurance company stocks fell, suggesting the market's assessment of the winners and losers from the case.

From a constitutional law perspective, the path taken by the Court in reaching its decision is extremely important. On the one hand, the Court's conclusion that the individual mandate could not be justified under either the Commerce Clause or the Necessary and Proper Clause confirms that the Court will continue to police the boundaries of Congressional power in a federalist system. Congress may have the power to *regulate* commerce – what people *do* – but it does not have the power to *compel* commerce – what people *do not do*. In a similar vein, the Court concluded that the Medicaid penalty provisions ran counter to the nation's "system of federalism" as Congress improperly went beyond pressure to compulsion.

On the other hand, in upholding the individual mandate under Congress's power under the Taxing Clause (even notwithstanding statements by the President and the Congress that this was not a tax), the Court gave deference to Congress in searching for any reasonable construction of the law in order to save the ACA from unconstitutionality. The Court also found the means to preserve the expansion of Medicaid by severing only the penalty provisions. In so doing, the Chief Justice remained true to his philosophy of judicial restraint rather than judicial activism, placing himself firmly in the company of Justice Oliver Wendell Holmes, Jr. and Justice Felix Frankfurter.

The Medicaid ruling is significant for states – and for providers. This means that each state will have the ability to determine whether or not to accept the Medicaid expansion terms, without the risk of losing all of its Medicaid programs should the state decide not to agree with expanded eligibility requirements. The ACA was structured so that most everyone had health care coverage – either through employer-provided plans, insurance purchased by individuals, or government-provided programs. The ACA expanded eligibility for Medicaid to provide health care for poor persons who do not have employer-sponsored insurance and who would be unable to pay for their own health insurance. If a state declines to enact the expansion, there will be a gap. The size of the gap—or the number of uninsured individuals—will depend on how eligibility standards are set. For providers, this likely translates into uncompensated care.

In Wisconsin, Medicaid eligibility has been more expansive than required by the federal government. Therefore, the question about what carrots and sticks apply to the Wisconsin Medicaid program is not clearly answered in the decision. This will likely be the subject of consideration and potential debate as the Wisconsin legislature develops the next biennial budget.

Perhaps the greatest impact from the ACA decision will be felt in the upcoming elections. The Court's characterization of the individual mandate as a "tax" will shape the political debates in the months to come. House Speaker John Boehner, presidential candidate Mitt Romney, and their supporters have already vowed to repeal the ACA following the decision, using the ACA "tax" as their rallying cry. As a result, some uncertainty will remain through and beyond the fall as elected officials sort out what provisions should remain and what should be modified or eliminated. Some of the provisions have proven popular with voters; other provisions have not. And, absent a Republican sweep in November, a total repeal of the Act is not likely. Nonetheless, Wisconsin Governor Scott Walker indicated that the state would not take action to implement provisions of the ACA until after the November elections and that he is counting on the next president and Congress to repeal it.

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