

Affordable Care Act Arguments: Minimum Coverage Provision

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Perhaps the most significant, and most contentious, of the provisions of the Patient Protection and Affordable Care Act of 2010's (the Act) is the so-called "individual mandate." The individual mandate requires virtually every individual in the United States to maintain "minimum essential coverage" (i.e. health insurance or other recognized form of health care coverage providing cost coverage for, at a minimum, certain prescribed benefits) beginning in 2014. For any month in which this minimum essential coverage is not maintained, a penalty is assessed against such individual based on the individual's household income subject to both a minimum and maximum penalty (the penalty).

On March 27, 2012, the Supreme Court of the United States (the Court) heard an astounding two hours of oral arguments from the interested parties over a challenge to the constitutionality of the individual mandate from 26 states (collectively, the states) and some individual parties (collectively, the individuals). In order for an act of Congress to be constitutional, the act must be a valid exercise of one or more of the powers specifically granted to Congress under Article I, Section 8 of the U.S. Constitution. In response to the constitutional challenge, the federal government has defended the individual mandate as valid exercises of its powers to:

1. regulate interstate commerce;
2. lay and collect taxes; and
3. make laws necessary and proper in connection with points one and two.

This article briefly sets forth the oral argument attendant to each of the three defenses (and challenges) to the constitutionality of the individual mandate.

Commerce

Congress has the power to "regulate Commerce...among the several States..." The federal government defends the individual mandate as a valid exercise of this power by focusing on the interconnectedness between the markets for health insurance and health care, claiming that "[the individual mandate] is a necessary component of a broader scheme of interstate commerce [i.e. health care]" and by noting that "[the individual mandate] itself regulates economic conduct with a substantial effect on interstate commerce [i.e. the financing of health care]" either one of which, individually, would be permissible under the power. The states and the individuals, on the other hand, focus their challenge on the distinction between health care and health insurance, claiming that the power of the federal government to regulate one interstate market (i.e. the market for health care) does not imply a separate power to require individual citizens to enter into an entirely separate market (i.e. the market for health insurance) prior to the point of health care consumption.

The vast majority of the allotted two hours was spent by attorneys for the various parties addressing questions from the justices dealing with the constitutionality of the individual mandate as an exercise of the commerce power. Justice Kennedy stated what, based on the various questions posed, appeared to be the primary concern of the Court with the federal government's position:

"[H]ere the government is saying that the federal government has a duty to tell the individual citizen that it must act, and that is different from what we have in previous cases, and that changes the relationship of the federal government to the individual in a very fundamental way."

In other words, as Justice Scalia put it, "[i]f the government can [impose the individual mandate], what else can it not do?" Ultimately, the decision of the Court as to the constitutionality of the individual mandate is likely to hinge on whether or not the federal government was able to convince the justices that upholding the individual mandate as a legitimate exercise of Congress' power to regulate interstate commerce will not lead down a slippery slope to a federal government with unlimited power to regulate individual conduct, or, as many pundits have posited, a federal government that can require everyone to eat broccoli.

Tax

Congress also has the power to "lay and collect Taxes, Duties, Imposts and Excises..." Despite the fact that proponents of the Act at the time it was being debated before Congress and in the court of popular opinion denied that the individual mandate and penalty amounted to a new tax, the federal government also claims that enactment of the individual mandate when coupled with the penalty was a valid exercise of Congress's taxing power. Specifically, the federal government argues that because the only penalty for a taxpayer's failure to satisfy the individual mandate is the penalty, the two provisions are inseparable, must be read as a single unit, and in substance operate as a tax. The states and the individuals counter by pointing out that the individual mandate and the penalty are separate provisions of the Act, the applicability of the individual mandate is much wider than the applicability of the penalty and Congress specifically chose *not* to characterize this as a tax.

Only a small fraction of the time allotted to each of the parties was devoted to discussing the individual mandate as an exercise of Congress's taxing power. Chief Justice Roberts made particular note of Congress's refusal to refer to the individual mandate (even when coupled with the penalty) as a tax when questioning counsel for the federal government: "Why didn't Congress call it a tax, then? You're telling me they thought of it as a tax; they defended it on the tax power. Why didn't they say it was a tax?" The most important question, and perhaps the only tax power question that matters, though, is whether or not the individual mandate can be viewed as a tax when decoupled from the penalty. As Justice Alito posed the question, "[c]an the mandate be viewed as a tax if it does impose a requirement on people who are not subject to the penalty or the tax?"

Necessary and Proper

In addition to the specifically enumerated powers above (and elsewhere in Article I, Section 8), Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution" its powers to regulate interstate commerce. This power, the federal government contends, grants Congress the power to enact laws which are "convenient, or useful" for carrying out the Act's comprehensive reform of the health care market. Specifically, the federal government points to several studies showing that other key provisions of the Act (i.e. the guaranteed issue and community rating provisions) would lead to substantial failure in the health care markets in the absence of the individual mandate. On the contrary, in the states' and the individuals' collective view, the necessary and proper clause only grants Congress the power to act in ways which are "consist[ent] with the letter and spirit of the Constitution" and, for the reasons set forth above, they contend that the individual mandate is not consistent.

Ultimately, however, the oral arguments confirmed only that the necessary and proper clause (as it is generally referred) does not grant the federal government power to regulate if, in Justice Scalia's words, the regulation "violate[s] the sovereignty of the states..." or "violates an equally evident principle in the Constitution, which is that the federal government is not supposed to be a government that has all powers; that it's supposed to be a government of limited powers." In the states' and individuals' views, as opposed to the federal government's, the individual mandate violates both of these principles. Whether the justices agreed will remain to be seen.

The Decision

Court watchers expect the Court to hand down its decision on the constitutionality of the individual mandate and the penalty sometime in June 2012. While speculation on the matter is rampant, there is no clear indication at this point what the ultimate outcome will be. Lawyers from Ice Miller's Health Care Group are closely monitoring all developments on this and related matters and will be preparing future updates as issues arise.

For answers to your health reform and other health care questions, please contact [Greg Pemberton](#) at (317) 236-2313 or Gregory.Pemberton@icemiller.com or any member of the Ice Miller [Health Care Reform](#) Group.

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