

Looking Ahead to the Supreme Court's Health Care Reform Hearings (March 26 – 28)

March 5, 2012

In three weeks, the U.S. Supreme Court will begin hearing oral argument on the constitutionality of certain provisions of the Patient Protection and Affordable Care Act (“ACA”). Almost three years to the day after the ACA was enacted, it will become the most significant piece of legislation reviewed by the Court since the Voting Rights Act in the 1960s. In anticipation of the major news coverage that will surely ensue, this post outlines the legal issues at stake, and takes a look at how the Court’s voting might line up.

Of the numerous (over 30) federal cases challenging the ACA, the Supreme Court agreed to hear three that had been appealed from the 11th Circuit, one of which is *Florida v. U.S. Department of Health and Human Services*, a case originally filed by Florida’s attorney general, who later was joined by 25 additional states as plaintiffs. Six hours of time (the longest amount of argument time allocated since the 1960s) has been reserved for oral argument before the Supreme Court on March 26, 27 and 28, 2012, on the following points:

A) THE TAX ANTI-INJUNCTION ACT

The tax anti-injunction act is a federal statute codified at 26 U.S.C. §7421(a) that, in relevant part, prohibits federal courts from enjoining enforcement of a federal tax unless and until the tax is actually being collected. The tax in question under the ACA is the monetary fine – called a “shared responsibility payment” – that would be required to be paid by individuals who don’t purchase insurance. In this instance, the individual mandate will not apply until 2014 and the penalty for failing to comply with the mandate will not be collected until April 2015. Neither the government, nor ACA opponents, are arguing that the anti-injunction act prevents the Court from hearing the case, so the Supreme Court has appointed independent counsel to argue the issue. This raises the possibility that the Court will use the anti-injunction act to “punt” a decision on the individual mandate into 2015, well past the presidential election. The Supreme Court has allocated ninety minutes to oral argument on this issue.

B) COMMERCE CLAUSE/INDIVIDUAL MANDATE

The Commerce Clause of the U.S. Constitution allows the federal government to regulate commerce among the states. Proponents of the ACA argue that our national health care system is in the midst of a huge crisis, with cost-shifting from uninsured to insured individuals creating a burden on interstate commerce that is well within the powers of the federal government to address. Opponents argue that the federal government has no right to reach into the pockets of state citizens and force them to purchase health insurance. They claim that this is a slippery slope of government intrusion into our personal lives that ultimately will result in mandated purchases of health food, etc. One additional problem is that the Commerce Clause permits the federal government to monitor active commerce

among the states, but in this instance it would be monitoring inactivity – the refusal to purchase insurance. The Supreme Court has allocated 2 hours of argument to this key issue.

C) SEVERABILITY

If the Court finds that the individual mandate exceeds Congress's powers under the Commerce Clause, will this require invalidation of the entire ACA or may the individual mandate be severed from the rest of the massive law? The government asserts that loss of the mandate would eliminate only the prohibition on pre-existing exclusion clauses, and community rating restrictions (which limit insurer's ability to peg health insurance premiums to a number of factors including health history), and that the rest of the ACA could be enforced. Opponents argue that the mandate – which will bring many young, healthy people into the insurance rolls – is intrinsic to the rest of the law, particularly insurance market reforms, and that the ACA cannot stand without it. Because neither side is expressly arguing that only the individual mandate be severed, the Supreme Court has appointed outside counsel to make that particular argument.

D) FEDERALISM/EXPANSION OF MEDICARE

Effective in 2014 the ACA extends Medicaid eligibility to all citizens and certain legal residents with incomes of up to 133% of the poverty level. This change will add 16 million people to the Medicare rolls and is a large part of the ACA's means of increasing access to health coverage. States not complying with the expansion risk losing all federal Medicaid funds, which generally exceed 50% of states' health care budgets. From 2014 through 2016, the federal government will pay 100% of Medicaid coverage for the new enrollees, then gradually will reduce its contribution to 90% in 2020. States, whose budgets are already stretched to the limit, argue that they cannot afford even 10% of the cost of the expanded Medicare access but that neither can they afford to opt out, and lose all federal Medicaid subsidies. Therefore they argue that Congress's expansion of Medicare on these terms violates states' 10th amendment rights to sovereignty. The Supreme Court has allocated one hour to oral argument on this issue.

Timing of Ruling

A decision on the March 2012 hearing may be made as soon as the end of the Court's 2012 spring term, on June 28, 2012. In this scenario, the ruling could have a major impact on the US presidential election, which by then will be in full swing. Of course, as mentioned, the decision may postpone the constitutionality issue until April 2015 under the anti-injunction argument.

Possible Outcomes

On balance it is thought to be more likely than not that the Supreme Court will uphold the constitutionality of the ACA, but there is no certainty to that prediction. The Court is dominated 5 to 4 by conservative Justices with Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Samuel Alito on the conservative side, and Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan on the more liberal side. Possible voting outcomes include a 5-4 decision striking down the mandate, or a 6-3 vote upholding it. Justices Bader Ginsburg, Sotomayor, Kagan and Breyer are almost certain to vote to uphold the mandate, whereas Justices Thomas and Alito are almost certain "no" votes on the mandate. That leaves three potential swing votes: Chief Justice Roberts, Justice Kennedy, and surprisingly Justice Scalia, who reportedly is

being “courted” by government attorneys briefing the ACA issues for the Court, by liberally quoting prior Scalia opinions. It is thought to be unlikely that Chief Justice Roberts will be the only conservative justice to uphold the mandate, but he might support it if, for example, Justices Scalia or Kennedy led the way. For an even more detailed assessment of the “odds,” check out [this article](#) by Andrew Cohen for The Atlantic.

If the Court upholds the individual mandate, it will take effect in 2014. If it finds the mandate to be unconstitutional it will address the severability issue, which could in turn impact survival of other ACA provisions not currently under review, such as employer pay-or-play provisions, the state exchanges, and could even result in a ruling that the entire ACA is unconstitutional. Inevitably the Supreme Court’s decision on the ACA will have broader implications for Congress’s power to regulate interstate commerce, and more generally for the balance of power between the federal government and the states.

<http://www.theatlantic.com/national/archive/2011/11/the-odds-betting-on-the-supreme-courts-health-care-decision/248441/>