

Constitutionality of Individual Mandate Will Be a Closer Vote Than Originally Thought

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March 27, 2012 – The second day of oral arguments before the Supreme Court on the constitutionality of the *Affordable Care Act* addressed whether Congress had power under the Commerce Clause of the Constitution to enact the individual mandate.

The Commerce Clause allows Congress to enact legislation that regulates an activity which has a “substantial effect” on interstate commerce. On behalf of various respondents, Paul Clement and Michael Carvin both argued that the *Affordable Care Act* exceeds Congress’ power under the Commerce Clause for two main reasons: (1) Congress has the power to *regulate* existing commerce, but not to force people to engage in commerce; and (2) the individual mandate is not a “necessary and proper” means of executing an otherwise constitutional exercise of Congress’ power to regulate commerce.

The Power to Regulate Commerce Does Not Include the Power to Compel Individuals to Enter Into Commerce

The majority of the Justices appeared to agree with the respondents’ position that forcing individuals to purchase health insurance goes beyond the regulation of commerce because it burdens only those persons who have not entered the health insurance market. In response, Solicitor General Donald Verrilli suggested that the subject of Congress’ regulation is not participation in the health insurance market, but “the method of financing health” care.

General Verrilli’s position was that everyone already participates in the health care market, whether they choose to purchase insurance or self-insure. Other laws ensure that health care will be provided to those in need, regardless of an individual’s ability to pay. General Verrilli therefore suggested that the individual mandate was necessary to ensure that the costs of uncompensated health care services are not borne by other Americans in the form of higher health insurance premiums. He then urged the Supreme Court to not interfere with Congress’ judgment that the individual mandate was most effective means to that end.

Justice Scalia disagreed with the premise of General Verrilli’s argument, stating: “I don’t agree with you that the relevant market here is health care. You’re not regulating health care. You’re regulating insurance. It’s the insurance market that you’re addressing and you’re saying that some people who are not in it must be in it, and that’s different from regulating in any manner commerce that already exists out there.”

As if to suggest otherwise, Justice Ginsburg then likened the individual mandate to Congress’ requirement that every working American contribute to Social Security. In her words: “A lot of people said – maybe some people still do today – I could do much better if the government left

me alone. I'd go into the private market, I'd buy an annuity, I'd make a great investment, and they're forcing me to paying for this Social Security that I don't want. But that's constitutional.”

Several of the Justices then suggested that allowing Congress to regulate insurance in this way could set a dangerous precedent. For example, Justice Alito commented that “Everyone is going to be buried or cremated at some point.” Justice Alito separately commented that, as with health care, “if you don’t have money, then the State is going to pay for [burial services].” Justice Alito then challenged General Verrilli to explain why allowing Congress to mandate the purchase of health insurance would be any different than allowing it to mandate the purchase of burial insurance. In response, General Verrilli suggested that the biggest difference is that, in the health care market, “billions of dollars of uncompensated costs are transferred directly to other market participants.”

The Justices didn’t stop with burial insurance. They asked the Solicitor General about the effect a holding in his favor would have on the Commerce Clause and its application to other markets, such as the transportation market and the food market. The Justices appeared concerned that, if the failure to purchase health insurance is held to substantially affect interstate commerce, the purchase of every product could be regulated under the Commerce Clause. Justice Scalia noted that the same effect would be seen with the automotive industry: “If people don’t buy cars, the price that those who do buy cars pay will have to be higher. So you could say in order to bring the price down, you are hurting these other people by not buying a car.”

A major concern for the Justices was that the market being regulated by the *Affordable Care Act* – the health care market – is too broad, and that allowing Congress to regulate it in this way would set a precedent that might allow Congress to regulate anything. Much of General Verrilli’s argument focused on the fact that the health care is a unique market because everyone is in the market. Applying this reasoning to the food market, Justice Scalia remarked: “Everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli.”

Is the Individual Mandate a “Necessary and Proper” Means of Executing Congress’ Power Under the Commerce Clause?

The Necessary and Proper Clause gives Congress the power to make all laws necessary and proper for carrying into execution its enumerated powers – in this case the Commerce Clause power. General Verrilli therefore suggested in his oral arguments that, by enacting the individual mandate, “Congress is choosing a tool that’s reasonably adapted to the problem that Congress is confronting.”

Past cases have held that the means Congress has chosen will be considered necessary if they are reasonably adapted. But as Justice Scalia remarked to General Verrilli: “The argument here is that this... may be necessary, but it’s not proper because it 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... If the government can do this, what, what else can it not do?” General Verrilli seemingly could not provide a satisfactory answer to the question, instead returning to the argument that the

Affordable Care Act should be upheld because Congress is regulating economic activity with a substantial effect on interstate commerce.

Congress may only exercise enumerated powers granted by the Constitution, and powers that are necessary and proper for carrying into execution those enumerated powers. Under the Tenth Amendment, the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Therefore, while States have a police power, the federal government does not. Justice Sotomayor asked Mr. Clement, speaking on behalf of 26 states, whether he thought the States could pass this mandate. Mr. Clement responded: “The States can do it because they have a police power, and that is the fundamental difference between the States on the one hand and the limited, enumerated Federal Government on the other.”

Justice Kennedy, who many believe may provide the swing vote, stated: “Here 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 the very fundamental way.”

What’s Next?

While oral arguments often are an uncertain guide to how the Court will vote, the Justices’ questions and comments signaled that the Supreme Court’s decision could be much closer than many had thought: four justices appeared to favor a ruling that the individual mandate is constitutional, and four justices appeared to disagree.

In the final day of oral arguments (March 28, 2012), the Justices will consider whether the rest of the *Affordable Care Act* can still operate as law if the Court concludes that the individual mandate is unconstitutional. The Justices will also hear oral arguments on a separate challenge to the *Affordable Care Act*: whether the expansion of Medicaid to make health care available to more Americans under terms that will increase the costs borne by the states violates state sovereignty.

About the Authors

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