

# Wrap Up on Constitutional Challenges to the ACA

**April 3, 2012**

A tremendous amount has been written already on the three days of Supreme Court oral argument on the Affordable Care Act's constitutionality (or lack thereof), so I will keep my comments brief. For more in-depth coverage, [www.scotusblog.com](http://www.scotusblog.com) features both technical, lawyers-only posts as well as "plain English" summaries for lay readers.

At stake in the Court's ultimate decision, in addition to the fate of the ACA and the larger issue of the reach of the federal government, is the balance in the division of powers between the nation's legislative and judicial branches. Keep in mind that the Supreme Court's review of the ACA is taking place in the midst of a remarkably lengthy and costly primary campaign season that in part was made possible by the Court's prior ruling in the Citizens United case. Without the Super PAC support authorized by the Citizens United case, neither Newt Gingrich nor Rick Santorum would still be in the race, however nominally. With the Supreme Court's decision on the ACA, the Citizens United decision will either be seen as an anomaly, or as an earlier step on the Court's path away from deference to Congress, and towards a more assertive counterbalance to the legislative branch.

No matter how sweeping the underlying issues, however, the Justices will decide the ACA case just like any other case, by casting preliminary votes, lobbying for said votes, and by drafting opinions. As volatile as the oral argument was at times, and as plainly as a few of the Justices displayed their apparent support of, or skepticism about, the ACA's constitutionality, the deliberations and drafting process may temper some of the more polarized views displayed in open court.

A few things to keep in mind between now, and late June (when a decision in the ACA case should occur):

- Former Solicitor General [Paul D. Clement](#), arguing for the 26 states opposing the ACA, [appears to have succeeded](#) in getting Justice Kennedy, a crucial swing vote, to frame the Commerce Clause issue from the states' perspective – i.e., that the federal government cannot create commerce in order to legislate it. For that reason alone, the individual mandate may not survive the Constitutional challenge. The outcome of the whole case may turn on whether Kennedy maintains his apparent view that Congress cannot "create commerce," or realizes during the deliberation and opinion drafting process that the commerce clause issue is much more nuanced and cannot be boiled down to so simple a premise.
- Much of the Justices' decision making process occurs in review of the parties' written briefs,

and questions on oral argument are not reliable predictors of how a particular Justice will rule on a case. Some of the questions may be aimed at lobbying other Justices.

- Chief Justice Roberts is believed to be unlikely to be the first to side with the four more liberal Justices supporting the Act (Kagan, Ginsburg, Sotomayor, Breyer) but it is not impossible that he would do so. Much more so than his “brethren” on the Court, the Chief Justice is driven by concerns outside the scope of this one case, however momentous – such as maintaining the consistency of the Court’s rulings on major legislation (which generally have deferred to Congress) and avoiding (or reducing) public perception of the Court as activist or politicized.
- If the individual mandate is deemed to be unconstitutional it is fairly certain that the Court also will strike down insurance market reforms that would otherwise be unaffordable for insurers: community rating, prohibition on lifetime and annual dollar limits on coverage, and the prohibition on pre-existing condition exclusions.
- What will happen to the balance of the ACA is uncertain. However, alternatives to the individual mandate do exist – [an early post from this blog](#) discusses some of the options.
- Major insurance carriers already have invested so much in ACA implementation that undoing compliance likely will be more expensive and disruptive than continued compliance through the watershed 2014 year. Employers will experience turbulence in the group market in the latter half of this year and into 2013.
- In a highly charged presidential election year, there likely will be significant political ramifications from the ACA ruling, and they may be counter-intuitive; i.e., striking down the ACA may better mobilize the Democratic base and convert independent voters to their cause, than would an obvious “victory” – a decision upholding the Act.

Much more remains to be said about the pending challenges to the ACA. I will continue to post on significant developments as they occur.

<http://www.scotusblog.com/>

<http://nymag.com/news/features/paul-clement-2012-3/>

<http://nymag.com/daily/intel/2012/03/how-paul-clement-won-the-obamacare-oral-arguments.html>

<http://eforerisa.wordpress.com/2011/01/22/throwing-the-individual-mandate-under-the-bus/>