

The Individual Mandate ó What Happened at the Supreme Court?
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EmpowerU Ohio Seminar
April 23, 2012

Introduction

I'm going to talk tonight about the recent arguments before the U.S. Supreme Court on the constitutionality of the individual mandate, which requires most Americans to purchase health insurance or pay a monetary penalty starting in 2014.

I plan to cover three things:

- General observations about the case
- Comments on the oral arguments before the Court
- My predictions on what the Court will decide

General Observations

First, my general observations:

- This case isn't really about health care. It's about how much control the federal government has over our lives. I think that's why the Supreme Court took the case so quickly.
- What's really at stake is the ability of the federal government to control our economy and redistribute wealth. It's one thing for the government to use the tax system to take our money and give it to someone else. It's another for the government to require us to pay money directly to others. If the government can force A to give money to B, it will have vast control over our lives and the economy.
- As the case moved through the courts over the last year, the Obama Administration was forced to change its arguments when they didn't hold up to scrutiny.
- In my opinion, the Solicitor General (who is the government's lawyer) was stuck making a flawed argument and did a good job under difficult circumstances.
- When the Justices ask tough questions, that doesn't necessarily indicate what they are thinking.

Comments on the constitutional arguments

Let me turn now to the recent arguments at the Supreme Court.

To win, the Administration must show that the individual mandate is permitted by either the Commerce Clause or the Necessary and Proper Clause of the Constitution.

The Commerce Clause gives Congress the power to regulate interstate commerce. The Necessary and Proper Clause gives it the power to make all laws necessary and proper to carry out its power to regulate interstate commerce.

I wrote an article for the Cincinnati Enquirer that was published the day before the Supreme Court arguments, and I put copies at the front table. It's mainly a guide for understanding the arguments under the Necessary and Proper Clause.

Tonight, I'd like to talk about the arguments made before the Court under the Commerce Clause.

My Enquirer article had just two sentences on the Commerce Clause that asked, "How can inactivity (not purchasing health insurance) in itself be considered commerce, let alone interstate commerce? And if it is, what's to stop Congress from forcing us to make other purchases or do other things?"

The Court explored those questions in a series of lively exchanges, and the discussion between the Justices and the Solicitor General was fascinating.

I'll give you some examples, but it's important to keep in mind the purpose of the questions asked by the Justices. The Constitution limits the power of the federal government by making it a government of enumerated and therefore limited powers. Unlike the individual states, the federal government doesn't have a general "police" power to regulate us as citizens in order to protect our health, safety and welfare. Instead, it has only specific delegated powers, such as the power to regulate us when we engage in interstate commerce. Our founding fathers thought this structure was essential to providing a check on federal power and protecting our liberty.

During the oral argument, the Justices were trying to determine whether they could uphold the individual mandate without causing the Commerce Clause to morph into a general police power that would permit the federal government to regulate all aspects of our lives. In other words, they were exploring whether the Administration's legal theory has logical limits, or a "limiting principle."

At the outset, the Justices explored whether not purchasing health insurance is in itself interstate commerce.

- The Solicitor General claimed it is. His theory was that everyone will eventually need health care, and if you don't pay your medical bills, the costs get shifted to others. As a result, a decision to forego health insurance is really a method of financing the future purchase of health care and is, therefore, interstate commerce.

- Justice Alito immediately challenged that assumption. He asked whether it would make any sense to approach two young, healthy people on the street and say to them, “You know what you’re doing? You are financing your burial services right now because eventually you are going to die and somebody is going to have to pay for it, and if you don’t have burial insurance and haven’t saved money for it, you’re going to shift the cost to somebody else.” He concluded by asking, “Isn’t that a very artificial way of talking about what someone is doing?”
- Several Justices pointed out that saying everyone will eventually need healthcare depends on how you define the market for health care. For example, not everyone needs a heart transplant, and people without children don’t need pediatric care. Those people certainly aren’t participating in certain parts of the health care market.
- Justice Scalia then made the point that, even if you accept the idea that everyone is participating in the health care market, the individual mandate requires the purchase of health insurance, not health care. In other words, it’s requiring a purchase in a market in which people clearly are not participating.
- Justice Kennedy summarized the point of these questions by asking whether in reality the government was forcing people to enter the stream of commerce. He described this as “changing the relationship of the federal government to the individual in a very fundamental way.”
- The Solicitor General responded to Justice Kennedy by arguing that the government can clearly require the purchase of health insurance at the “point of sale” when you get health care and that requiring it in advance isn’t significantly different. It wasn’t clear whether that argument satisfied Justice Kennedy.

The Justices also explored whether under the government’s theory Congress can force us to make other purchases or do other things.

- Justice Scalia asked whether the government can require us to purchase broccoli or cars.
- The Solicitor General argued that the health care market is unique because the purchase of health care is:
 - Inevitable
 - Unpredictable
 - Potentially costly
 - And results in cost-shifting to others if you don’t pay your bills
- Justice Roberts pointed out that emergency services are inevitable, unpredictable, potentially costly, and result in cost shifting if you don’t pay your bills. He asked

whether the federal government could require everyone to purchase a cell phone so they would have the means to call 911 in an emergency.

- The Solicitor General tried to distinguish Justice Roberts's example by saying it didn't involve the regulation of a market because the services are provided by the government.
- Justice Scalia made the point that it's not sufficient merely to describe the characteristics of a regulated market and say those characteristics are a limiting principle. He said that's like saying Congress can only regulate interstate commerce among people with blue eyes. His point was that there's no basis in the Constitution to make a distinction like that between permitted and unpermitted regulation.
- At one point, Justice Scalia asked whether under the government's theory that health care is unique the government could force people to exercise. After all, the failure to exercise increases health care costs and results in cost-shifting when people don't pay their bills.
- The Solicitor General tried to answer that by saying the government can use its power under the Commerce Clause only to impose mandates that (1) regulate the method of payment for health care and (2) do that by requiring people to purchase insurance in advance.
- Justice Roberts rejected the idea that the Constitution makes such fine distinctions in how Congress can regulate interstate commerce. He pointed out that the Supreme Court has repeatedly said that when interstate commerce exists, Congress has what's called plenary (or absolute) power to regulate it. In other words, it's not up to the courts to distinguish which activities in interstate commerce can be regulated and which can't.

Given this line of questioning, it seemed clear that the Administration's arguments on the Commerce Clause didn't get much traction with the conservative Justices.

The only possible exception is Justice Kennedy. He made three points that suggested he could be receptive to the government's arguments.

- On the question of whether the uninsured are already participating in the health care market and therefore are engaged in interstate commerce, he said the uninsured are "in the market in the sense that they are creating a risk that the market must account for."
- On the question of cost shifting as a factor in health care being unique, Justice Kennedy said the uninsured are "close to affecting the rates of insurance and the costs of providing medical care in a way that is not true in other industries."

- Justice Kennedy also commented that if the government could use its taxing power to achieve the same thing as mandating the purchase of health insurance, he could see an argument for the Court to give the government some latitude on using the commerce power to do so as well.

It's hard to assess what these statements mean for how Justice Kennedy will vote.

I don't have time tonight to get into the arguments that were made under the Necessary and Proper Clause, but the government seemed to have even less success there. In the course of the questioning, the conservative Justices raised almost all the points listed in my Enquirer article.

Overall, it was a bad day for the Administration. One liberal commentator who covers the Supreme Court called it a "train wreck" for the Administration.

Final observations

Let me offer some final observations:

- I think the odds are that the Supreme Court will strike down the individual mandate as unconstitutional. It seems clear that Justices Alito and Scalia will vote that way. I assume that's true of Justice Thomas as well. It's less clear with Justices Roberts and Kennedy, but my guess is they will do the same. That would mean at least a 5-4 decision to strike down the law.
- My sense is that all the so-called "liberal" Justices will vote to uphold the law. Based on their questions, they seem to believe the failure to purchase health insurance constitutes interstate commerce. They also don't seem alarmed by the possibility the government can force us to purchase other products.
- If the Court decides the individual mandate is unconstitutional, one of three things can happen:
 - The Justices can strike down only the individual mandate.
 - They can strike down the individual mandate and other parts of the law.
 - They can strike down the entire law.
- I think it's likely they will strike down just the individual mandate or strike down the entire law. Otherwise, they will have to analyze the 2,700 page bill and pick and choose the provisions to keep. Justice Scalia joked that requiring them to do that would be cruel and unusual punishment in violation of the Eighth Amendment!
- If the Court upholds the individual mandate, it will be up to Congress to decide whether to leave it in place. Since it is so unpopular, I would expect it to be repealed eventually, which would presumably require a major overhaul or repeal

of the whole law. It is possible pressure will build to repeal the entire law when its costs and intrusions become more evident.

- Given the possibilities, it is critical to defeat President Obama and help the Republicans keep the House and take control of the Senate this November so they can enact genuine health care reform that achieves many of the same goals without sacrificing our freedom. Paul Ryan's healthcare proposals are designed to do that.
- In the meantime, I would urge people to support the Interstate Health Care Compact under consideration in Ohio and the efforts to keep Ohio from setting up state exchanges under the Affordable Care Act.

Overall, I'm optimistic that, one way or another, we'll win this fight and preserve our freedom.