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Summary of the Supreme Court Decision on the ACA: Court removes the "gun from the States' heads" but leaves open possibility of States shooting themselves in the foot

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In *National Federation of Independent Business v. Sebelius*, the Supreme Court upheld the constitutionality of most of the Patient Protection and Affordable Care Act (ACA).[2] Issued yesterday, the decision is surprising not only for its legal reasoning but also because of how the Justices voted.

1. Anti-Injunction Act Does Not Bar Review of the Merits

As expected, the Court held the Anti-Injunction Act (AIA) did not prevent it from determining the constitutionality of the individual mandate. The AIA prohibits litigation to enjoin or otherwise restrain the collection of taxes, thus generally allowing taxes only to be challenged by persons who have paid the tax and then sued for a refund. The question was whether the penalty that individuals must pay for ignoring the individual mandate is a tax within the meaning of the AIA. If a tax, then the AIA would bar a challenge to the individual mandate because the penalty provision does not become effective until 2014.

The Court held that the penalty payment provision does not establish a tax. It based the decision on a straightforward reading of the words that Congress used in the ACA. It noted that Congress chose not to describe the penalty as a tax, but used the term "tax" to describe other "exactions" created by other provisions of the ACA. Then, relying on the statutory maxim that Congress is presumed to act intentionally when using certain language in one part of a statute and different language in another, it concluded that Congress did not intend this to be a tax.

This conclusion seems at odds with the majority's decision to uphold the individual mandate as a constitutional tax. The opinion addresses the apparent contradiction, stating that, while nomenclature is significant for determining the applicability of the AIA, an Act of Congress, it is not definitive in determining whether an exaction is a tax or a penalty for constitutional purposes. As seen below, this is the only unanimous decision in the case.

2. Minimum Coverage Requirement Valid Exercise of Congressional TAXING Authority

In a result that surprised many, the Court held that the individual mandate is effectively a "tax," despite being called a "penalty," and is a valid exercise of Congress's power to tax. At the same time, the Court held that the mandate exceeds Congress's power under the Commerce Clause of the U.S. Constitution.

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[1] A version of this document was prepared for the American Public Health Association and distributed to APHA in association with the Network for Public Health Law.

[2] *National Federation of Independent Business v. Sebelius* is the short-hand reference to the Supreme Court opinion. The appeal actually involved three cases that were heard and decided together: *National Federation of Independent Business v. Sebelius*, *Florida v. DHHS*, and *DHHS v. Florida.*

Regulating interstate commerce: By a vote of 5-4, the Court held that the individual mandate exceeds congressional power under the Commerce Clause. The majority was comprised of Chief Justice Roberts and the four dissenting Justices (Scalia, Kennedy, Thomas and Alito).

The Commerce Clause gives Congress the power to "regulate Commerce…among the several States." Over the last 80 years, these six words have been expansively interpreted to allow Congress to regulate not just interstate commerce itself, but individual activities that, in the aggregate, "substantially affect" interstate commerce. Yesterday, however, the Court established a significant new boundary on congressional authority. According to the Chief Justice's opinion, as expansive as cases construing the commerce clause power have been, they uniformly describe the power as reaching "activity." This contrasts, he said, with the individual mandate, which is an attempt to regulate "inactivity," i.e., the refusal to purchase health insurance. He concluded that this goes beyond what the Commerce Clause allows and moves into the area of "police power," which is exclusively vested in the States. Returning to the familiar broccoli example, though refraining from naming broccoli itself, he posited that a decision allowing the mandate under the Commerce Clause would allow for legislation "ordering everyone to buy vegetables" to address the problem of unhealthy diets resulting in widespread obesity and increased health care costs. "This is not the country the Framers of our Constitution envisioned," he said.

It remains to be seen whether this holding will have significant effect in the future to limit Congress's power under the Commerce Clause or whether, in light of the unique characteristics of the individual mandate, it will be interpreted narrowly and not lead to substantial changes in Commerce Clause jurisprudence.

Exercising taxing power: As an alternative to the Commerce Clause, the federal government had argued that the individual mandate could be upheld under Congress's enumerated constitutional power to "lay and collect Taxes." This argument was by no means the centerpiece of the government's argument, representing only 217 lines in the voluminous transcript of the oral argument before the Court.

Yet, in a part of the opinion joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, Chief Justice Roberts held that the mandate is a valid exercise of the taxation power. This, despite the fact that the financial consequence imposed on an individual who does not purchase health insurance was labeled as a "penalty" in the ACA. To reach this result, the Court relied not upon the words of the statute but rather took a functional approach to determine that the exaction is a tax: it is paid to the Treasury when taxpayers file their tax returns; it does not apply to individuals who do not pay federal income taxes; it is determined by familiar factors such as number of dependents, taxable income and joint filing status; it is found in the Internal Revenue Code and enforced by the IRS; and it produces at least some revenue for the Government (expected to be about $4 billion per year by 2017). The majority was not bothered by the fact that the individual mandate is intended to affect individual conduct, not just to raise revenue, noting that the use of taxes seeking to affect conduct is nothing new. For example, substantial taxes are imposed on the purchase of cigarettes, which are intended not just to raise money, but to encourage people to stop smoking.

Chief Justice Roberts' opinion, while upholding the centerpiece of the ACA, has almost certainly reframed the political debate in the months leading up to the presidential election. The opponents of "ObamaCare" are sure to attempt to tie this holding to many Americans' antipathy to higher taxes.

3. Medicaid Expansion: Court Buys the "Gun to the Head" Analogy

The Spending Clause of the U.S. Constitution empowers Congress to address issues of national concern by offering federal funds to states in return for their agreement to abide by the standards set by the federal government as a condition of receiving the funding. For the first time ever, a federal court has found Congress's exercise of Spending Clause authority to be unduly coercive. The Supreme Court's actions, both in agreeing to consider the question and deciding it as it has, are unprecedented. It is also surprising that seven of the justices agreed that the expansion is unduly coercive, and only Justices Ginsburg and Sotomayor dissented. Of equal interest is how the Chief Justice, joined by Justices Breyer and Kagan, crafted a remedy for the violation that gained the support of Justices Ginsburg and Sotomayor to form a 5-4 majority.

By a 7-2 margin, the Court accepted the argument from 26 state officials that they were being unduly coerced into accepting the ACA's requirement to expand Medicaid to individuals with incomes under 133% of the federal poverty level. The ACA inserted the expansion provision into the existing Medicaid statute, which includes a long-standing provision authorizing the Secretary of Health and Human Services (HHS) to terminate all federal funding to a state that does not comply with a mandatory federal requirement. Thus, the state officials argued, if they did not implement the expansion, they would lose all federal funds. Moreover, though participation in Medicaid is voluntary, States argued that, as a practical matter, they have no choice but to participate.

Accepting the state officials' argument at face value, Roberts' opinion rests on three premises. First, the ACA's Medicaid provision created a new program, not an addition to the Medicaid program that existed before the ACA. Chief Justice Roberts found the original purpose of Medicaid, as stated by Congress, was to serve families with children and the aged, blind and disabled. Previous Medicaid amendments and expansions, such as those in the 1980s and 90s, he noted, concerned only these populations. By contrast, the ACA Medicaid expansion mandated inclusion of an entirely new group. According to Roberts, Medicaid was "transformed" from a program serving designated population groups to "a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the federal poverty level." Thus, he concluded, the ACA expansion made Medicaid "no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."

Second, the Chief Justice found that States were being treated unfairly because they had inadequate notice that the new expansion program would be a part of the Medicaid deal. Previous Supreme Court cases have noted that Spending Clause programs are similar to contracts. Thus, Congress must establish clear notice of Spending Clause requirements so that States will know what they are getting themselves into if they decide to participate. According to Roberts, when States first decided to participate in Medicaid, they did not foresee a requirement to include everyone below a certain percentage of poverty.

Finally, likening the situation to "a gun to the head," Justice Roberts found that Congress was forcing the States to accept the unanticipated new program by threatening them with the loss of all federal funding for the old one. Given the importance of Medicaid (averaging 20% of the State's total budget), States had no choice but to implement the expansion and were thus being unduly coerced into accepting it.

The next question facing the Court was what to do about the infirmity. A 5-member majority agreed to Chief Justice Roberts' deft conclusion: the constitutional violation can be fully remedied by prohibiting the Secretary of HHS from terminating all federal Medicaid funding to a state that does not want to undertake the expansion.

As a practical matter, this means that the Medicaid expansion has become optional for the States. However, the Court has issued a carefully crafted, narrow holding—one that curbs the federal power to enforce the Medicaid expansion but that maintains the ACA and the Medicaid Act in all other respects.

- States wanting to implement the expansion are free to do so. The ACA funding stands: 100% federal funding, to be phased to 90% over time.

- Implementing States must comply with all of the Medicaid Act. Justice Roberts stated, "Nothing in our opinion precludes Congress from offering funds under the ACA to expand the availability of health care, and requiring that states accepting such funds comply with the conditions on their use."

- States not implementing the expansion must still comply with all other provisions of the Medicaid Act or risk losing federal Medicaid funding.

- The ACA's other newly added Medicaid provisions will continue in full force and effect in all States, including, for example, increased payments to Medicaid participating primary care providers, mandatory coverage of freestanding birthing centers, options for expanding coverage of community-based services and supports for people with disabilities and the elderly, and gradual reductions in disproportionate share hospital funding beginning in 2014.

- Congress maintains its authority to implement publicly funded health coverage expansions through the Spending Clause.

This does not mean that there are no unanswered legal or policy questions, however. Foremost among these, will States shoot themselves in the foot by refusing to expand their Medicaid programs to currently uninsured health care consumers using 100%/90% federal funding? Moreover, while the decision applies narrowly to the Medicaid expansion, future Spending Clause litigation—involving Medicaid and other programs—will attempt to push the limits of the Court's holding. A host of practical issues will arise. For example, does the federal government retain the authority to withhold other, non-expansion ACA funds to a State that does not implement the Medicaid expansion? Can States implement a partial expansion to, say, 75% of the federal poverty level? Do the new eligibility determination "MAGI" rules apply to Medicaid determinations in States that do not implement the expansion? What happens in a State that implements the expansion with 100% federal funding but decides to end the coverage when the federal match drops to 90%? These and other questions will need to be resolved through legislative, administrative or legal actions.

Conclusion

The Supreme Court has left most all of the health reform law intact, including centerpiece provisions requiring individuals to have adequate insurance coverage and insurance companies to abandon pre-existing condition exclusions and lifetime caps on coverage. The Court's decision means that federal and state policy makers and health care providers will continue to prepare for and implement comprehensive health reform, even though some states could decide to opt out of the Medicaid expansion. Highly popular provisions that are already in effect will not be lost, including coverage for young adults and no-cost preventive care visits for seniors.

The battles over health reform are not over, however. Attacks against the law will now be focused in the political arena and promise to be a significant factor in the November elections. In addition, litigation will not end. Yesterday's decision will breed new challenges. Some of the already-existing cases, stayed while the Court considered the Florida cases, involve targeted attacks on the ACA involving, for example, claims that the law infringes religious freedoms and illegally establishes an independent Medicare payment advisory board. These cases will move forward.