

US Supreme Court upholds Obamacare

By Christopher Withers



Introduction

The oral argument in *National Federation of Independent Business Et Al v Sebelius, Secretary of Health and Human Services, Et Al*, the challenge to President Obama's health care law, took place over three days in March 2012 and went, by most accounts, very poorly for the United States. The solicitor-general for the United States, Donald Verrilli (who took over from Elena Kagan when she was appointed to the Supreme Court in January 2011 and whose opponent in the case was former solicitor general, Paul Clement) was criticised for what some court commentators described as the 'train wreck' that the government's argument had become by the time the solicitor-general sat down. It was, therefore, a gigantic relief for the government and many millions of Americans when the Supreme Court, by a 5-4 decision, upheld the law on 28 June 2012. The outcome of the case certainly appeared to be finely balanced when the judgment was reserved but the result was something no-one appeared to have predicted. The legislation was found to be valid under Congress's taxing power (the government's secondary argument) and Chief Justice John Roberts joined the 'liberal' wing of the court to uphold the law.

The Legislation

The Patient Protection and Affordable Care Act was passed in 2010, in order to increase the number of

Americans covered by health insurance and decrease the cost of health care. A central provision of the law was 'the individual mandate', which required most Americans to maintain 'minimum essential' health coverage by purchasing insurance from a private company. Beginning in 2014, those who do not comply with the mandate must make a 'shared responsibility payment' to the United States Government. The Act provided that this 'penalty' would be paid by the individual to the Internal Revenue Service and would be 'assessed and collected in the same manner' as tax penalties. The policy justification for the legislation is as follows. State and federal laws require hospitals to provide a certain degree of care to individuals without the ability to pay and the costs of providing that care is passed on by hospitals to insurers and by insurers to the insured. Many of the uninsured do not have insurance because of pre-existing conditions or other health issues. The legislation required insurance companies to provide insurance to individuals with pre-existing conditions, but compensated them by including within the 'insurance risk pool' more healthy individuals who were compelled by the legislation to purchase insurance and whose premiums on average would be higher than their health care expenses. That allowed insurers to subsidise the costs of covering the unhealthy individuals for whom the law required them to provide coverage.

The Act also expanded the scope of the Medicaid program, administered by the states since 1965, partially with federal funding. It required the states to increase the number of individuals for whom the states must provide coverage, or else lose potentially all federal funds for their Medicaid programs. On the day the president signed the Act into law, twenty-six states, several individuals and the National Federation of Independent Business brought suit in Federal District Court, challenging the constitutionality of the individual mandate and the Medicaid expansion. The Court of Appeals for the Eleventh Circuit upheld the Medicaid expansion as a valid exercise of Congress's spending power, but concluded that Congress lacked authority to enact the individual mandate.

Constitutionality of the legislation

The government's arguments

In the Supreme Court, the government argued that Congress had the power to enact the individual mandate through the power granted to Congress under Article I, §8, cl. 3 of the United States Constitution, which gave Congress the power to 'regulate commerce with foreign nations, and among the several states, and with the Indian tribes'. That power has traditionally been interpreted as meaning that Congress could regulate the channels of interstate commerce and those activities that substantially affect interstate commerce.¹ The government argued that the failure to purchase insurance had a 'substantial and deleterious effect on interstate commerce' by shifting the cost of caring for the uninsured to hospitals, insurers and the insured.

The government's alternative argument was that the mandate was valid as within Congress's power under Art. I, §8, cl. 3 to 'lay and collect taxes...and to pay debts and provide for the common defence and general welfare of the United States' (the power to tax and spend) because it imposed a tax on those who failed to purchase health insurance. In other words, if the commerce power did not support the individual mandate, the government argued, the court should uphold the law as an exercise of the government's power to tax.

The majority's reasoning

During oral argument on 27 March 2012, Justice Anthony Kennedy cut straight to the heart of the debate about the validity of the individual mandate under the commerce clause: 'Can you create commerce in order to regulate it?'. The solicitor-general responded 'That's not what's going on here, Justice Kennedy, and we're not seeking to defend the law on that basis'.²

The answer failed to satisfy a majority of the court and Chief Justice Roberts wrote the majority opinion holding that the individual mandate could not be supported by the commerce clause. The reason was simple: the power to *regulate* commerce presupposes the existence of commercial activity to be regulated and the individual mandate did not regulate existing commercial activity. Instead, it compelled individuals to become active in commerce by purchasing a product, on the basis that their failure to do so affects interstate commerce. The chief justice held that '[c]onstruing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority' and would render many of the provisions in the Constitution superfluous (*Id.* at 18 and 20). Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation and would 'justify a mandatory purchase to solve almost any problem' (*Id.* at 21-22). The framers of the Constitution gave Congress the power to *regulate* commerce, not compel it, which the legislation sought to do because the individual mandate commanded individuals to purchase insurance. In other words, while the commerce power was broad and expansive, it was not broad enough to compel individuals not engaged in commerce to purchase an unwanted product (*Id.* at 18, 27 and 30).

The chief justice noted that 'every reasonable construction' of a statute 'must be resorted to, in order to save a statute from unconstitutionality' (*Id.* at 32). An Act of Congress could only be struck down if the lack of constitutional authority to pass the act in question was clearly demonstrated and the conclusion of unconstitutionality was 'unavoidable' (see *Id.* at 6 and 31). While the legislation described the payment to the IRS for failure to purchase health insurance as a

'penalty', the court held that it was necessary to look past the label at the substance and application of the law. The law did not attach negative legal consequences to the failure to purchase health insurance, beyond requiring a payment to the IRS and it did not seek to punish unlawful conduct.

The majority opinion accepted that the individual mandate could properly be characterised as a tax which fell within the scope of Congress's power to legislate taxes (at 44). That was because (even though it was described as a 'penalty') it lacked the usual characteristics of a penalty insofar as the IRS could not use its powers to enforce penalties to enforce payment of the tax (at 36). Further, it did not seek to punish unlawful conduct because individuals could choose to pay the penalty or purchase health insurance (at 37). The chief justice noted that it was estimated by the Congressional Budget Office that four million people each year will choose to pay the IRS rather than buy insurance, that Congress would be 'troubled by that prospect if such conduct were unlawful' and Congress's tolerance for that fact suggested that Congress 'did not think it was creating four million outlaws' (at 38).

As for the Medicaid expansion, Chief Justice Roberts was joined by Justice Breyer and Justice Kagan and the joint dissenting opinion, in concluding that the Medicaid expansion violated the Constitution by threatening states with the loss of their existing Medicaid funding if they declined to comply with the expansion. While the spending clause of the United States Constitution gave Congress the power to establish cooperative state-federal programs, it did not give Congress the power to threaten to terminate other grants as a means of pressuring the states to accept a spending clause program, i.e. it did not give Congress the power to order the states to regulate according to Congress's instructions (at 55, 58).

Dissenting opinions

Justice Ginsburg disagreed with the majority opinion and held that the legislation was a valid exercise of Congress's power under the commerce clause (at 31) and that the Medicaid expansion was authorised by

the spending clause (at 61). Her Honour reasoned that the majority's interpretation of the commerce clause was 'stunningly retrogressive' (at 2) and that the chief justice's reading of the clause 'should not have staying power' (at 3). Her Honour cited the substantial impact that the uninsured had upon interstate commerce (at 16) and found that the decision to forgo insurance was not the equivalent of 'doing nothing' (*Id.*). Rather, according to her Honour, it should be characterised as an economic decision made by individuals to 'self-insure' that Congress had the authority to address under the commerce clause (at 17, 28). The legislation did not mandate that individuals purchase an unwanted product, but merely defined 'the terms on which individuals pay for an interstate good they consume' (at 22). Her Honour described the chief justice's reasoning variously as 'specious', 'puzzling' and 'disserving' to future courts and a constraint upon Congress's authority to confront new problems arising in the modern economy (at 37).

Justices Scalia, Kennedy, Thomas and Alito wrote separately from the majority and concluded that the legislation was not authorised by either the commerce or taxation power. Their Honours held that the Act exceeded federal power both in mandating the purchase of health insurance and in denying non-consenting states all Medicaid funding (at 3). The dissent held that the individual mandate could only fairly be described as a penalty, rather than a tax (at 18), that the arguments to the contrary were 'feeble' (at 24) and that one had to 'rewrite' the law in order to conclude otherwise (*Id.*). Likewise, the joint dissent found that the Medicaid expansion was unconstitutional (at 48).

Analysis

The court's decision was framed by the chief justice as a test of the limits of the government's power 'and our own limited role in policing those boundaries' (at 2). His Honour was careful to emphasise that in upholding the legislation, the court was not expressing a view as to 'whether the Act embodies sound policies' (at 2, 6, 44 and 59). That judgment, his Honour said, was entrusted to the nation's elected leaders 'who can be thrown out of office if the people disagree with

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them' (at 6). The decision was perhaps most surprising because the government had primarily defended the law on the basis of the commerce power.

The reasoning of the majority and the joint dissenting opinion as to the scope of the commerce power seems compelling. Notwithstanding the potential impact of uninsured Americans on interstate commerce, the fundamental premise that Congress can only regulate activities was consistent with historical precedent. No decision of the court had ever extended the commerce clause to enable Congress to regulate inactivity and Justice Ginsburg's thesis that the failure to acquire health insurance amounted to an 'economic decision' which Congress was entitled to regulate, did not appear to bridge the gap between the commerce clause and the absence of any regulated activity. As the chief justice observed, pointing to the substantial impact of the 'inactivity' in question (the failure to purchase health care) did not justify characterising the inactivity as interstate commerce.

Some commentators have suggested that the decision has far reaching implications and may have the effect of circumscribing the traditionally broad and expansive interpretation the Supreme Court has given to the commerce clause to regulate activities that 'substantially affect interstate commerce'³. That seems unlikely. The decision drew a line in the sand and preserves the power of Congress to regulate interstate commerce, so long as the regulation concerns an existing activity. The power does not authorise Congress to create commerce in order to regulate it. As the chief justice noted (at 18), Congress had never attempted to rely on the commerce clause to compel individuals not engaged in commerce to purchase an unwanted product (a 'legislative novelty') and it is unlikely to ever attempt to do so again. Future jurisprudence concerning the commerce clause is likely to remain concerned with the application of the commerce clause to existing activity and following the Supreme Court's decision, the broad parameters of that power remain intact.

Chief Justice Roberts has been subject to substantial criticism among conservative commentators for voting to uphold the law but in reality, his decision was a straightforward application of principle. His Honour held that if there was an interpretation of the law that was 'fairly possible' which preserved its Constitutional

validity, then the law should be upheld (at 32). His Honour and the majority held that it was reasonable to interpret the individual mandate as a tax and that the law should be upheld on that basis. The reasoning was perfectly sound.

It remains to be seen whether the decision represents a change in the balance and dynamic of the court. One wonders about the internal dynamics within the court and whether their Honours are affected by such a heated and high stakes debate resulting in a dissent from Justice Ginsburg which speaks of the majority opinion in terms that cannot be good for the public's perception of the court. Perhaps that is just par for the course.

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The next most significant battle on the Supreme Court's horizon may take place as soon as the October term next year. The United States Department of Justice has asked the Supreme Court to consider a legal challenge to section 3 of the Defence of Marriage Act, which defines marriage as a union between a man and a woman. The Ninth Circuit Court of Appeals is also hearing a challenge to California's Proposition 8, which prohibits same sex marriage. When the gay marriage debate is finally considered by the Supreme Court (as appears inevitable), the challenge to the Patient Protection and Affordable Care Act will seem like a petty quarrel by comparison.

Endnotes

1. See *United States v Morrison*, 529 US 598, 618-619 (2000).
2. See oral argument transcript, http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf, p.4.
3. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)