COVER STORY

Health Care's Days in Court

With the constitutionality of the Affordable Care Act on the line, upcoming high court oral arguments over the health care law expose the battle lines

By Gail Sullivan and Fred Barbash

As the Supreme Court prepares to hear oral arguments in the health care case next week, each side has its own version of the law at issue, and they don't look much alike.

There's no "individual mandate" in the government's brief to the court. It's a "minimum coverage provision." And no one is penalized for not buying insurance. Rather, they face "adverse tax consequences" for attempting to "self-insure."

The parties challenging the law, by contrast, have built their argument around the mandate, which, plain and simple, "forces individuals to obtain insurance." They call the administration's portrayal "euphemistic," at best.

Big court cases, like big political campaigns, sometimes come with competing narratives designed, often, to square their arguments with the court's precedents or, in the case of the states and others that sued to defeat the law, to distinguish the law from a line of precedents that support the constitutionality of America's regulatory state.

But the divergence of narrative in the health care cases is particularly sharp, perhaps because no prior case has been quite like this one. Basically, the government wants the law to seem normal, as if there were nothing much to make it stand out from laws that have been upheld in the past. Those suing to defeat the health care law want it to look deviant.

As the government sees it, no one is being forced to get coverage. Everyone already has coverage — even if they don't know it. If they get hit by a truck, for example, they'll be treated whether or not they have insurance.

They're covered, all right. They're just not paying for it. And that's all the law does. It makes them pay in advance for what they already have.

That's the gist of the Obama administration's portrayal of the health care law to the Supreme Court. The law is unique, they argue, because it involves health care, which sooner or later everyone needs. That's not true of much else.

By this argument, there's no merit to critics' slippery-slope claims that if the court upholds the law, there will be no end to what Congress can make Americans buy — broccoli being the most oft-cited example. Nobody, as a matter of life and death, needs broccoli. Nor is it customary to insure ourselves against future broccoli-related contingencies.

TWO YEARS AGO: The court will hear the health care case a few days after the second anniversary of the bill's signing by President Obama on March 23, 2010.

The states that sued to block the law just "imagine various 'mandates,'" the government says, and are "'conjuring up horrible possibilities that never happen in the real world.'" The alleged conjurers, in this instance, are the 26 states, led by Florida, the National Federation of Independent Business, and a handful of individuals who filed suit to stop the mandate.

Dragged Into the Stream?

In the challengers' briefs on the central issue, the "individual mandate" is used almost exclusively. What it does, they say, is drag people into the insurance market who don't want to be there. While the Constitution's Commerce Clause permits the government to regulate the "stream of commerce," it does not allow the government to march people into the stream in order to regulate them.

One thing both sides agree on is that the cases, collectively known as "the health care case," are among the most important in modern history.

But of course, the court knows that. And the justices will be reminded of it when they show up next Monday and see throngs of activists sent to spin the press outside while the lawyers are busy inside.

It's a kind of constitutional carnival, and it will last a total of six hours, over three days, rather than the usual single hour per case allotted by the court.

After all, the justices have not been sequestered for the past three years. By now, they've read the briefs, quite possibly know how they are likely to vote, and are not immune to their own ideological and political inclinations. For some of them, the oral arguments may not matter. If the justices are generous, a lawyer might get a full sentence out before being interrupted.

The lawyers will struggle to stay on message. Like politicians, they rely on "framing" to present their case in the best light, offering dire predictions of what might happen if the court goes the wrong way.

Critics say that if the court doesn't strike down the law, there will be no limits to Congress' power. "The mandate forces individuals to purchase insurance. . . . The implications of Congress' newly minted theory of its commerce power are breathtaking."

The government, in turn, suggests in its briefs that a wrong decision will raise questions about the court's power.

"Congress enacted the Affordable Care Act and chose to include the minimum coverage provision after years of careful consideration and after a vigorous national debate," Solicitor General Donald B. Verrilli, Jr., told the court. "That was a policy choice the Constitution entrusts to the democratically accountable branches to make, and the court should respect it."

Into each narrative, the lawyers must somehow fit the court's relevant cases.

An Ohio farmer named Roscoe Filburn is the poster child for the notion that choices about personal matters, such as how to feed or care for oneself, have an impact on in-

terstate commerce. Filburn was fined for exceeding a New Deal-era quota on wheat production, although the extra he was growing was for his own use. Filburn argued that the fine was unfair — the personal wheat had nothing to do with the commercial market.

In 1942, in *Wicker v. Filburn*, the court agreed with the government, citing the cumulative effect of self-producing farmers such as Filburn on the demand for wheat purchased in the marketplace.

The wheat "supplies a need of the man who grew it, which would otherwise be reflected by purchases in the open market," Justice Robert H. Jackson wrote in the opinion. "Home-grown wheat in this sense competes with wheat in commerce."

In the health care case, the government and the parties attacking the law have, in briefs and in lower-court oral arguments, portrayed a Farmer Filburn-type figure — a hypothetical class of people sitting at home minding their own business, without health insurance policies.

In the challengers' version of the story, the uninsured are forced to buy a commercial product that they don't want and that the government has no business requiring of them.

According to the government, this case isn't about the requirement to buy, it's about the failure to pay.

PRECEDENT: Farmer Roscoe Filburn in 1942 could not have anticipated his modern-day importance.

To read some of the commentary on the case, it would appear that a lot of court watchers think they know which version of the story the justices will buy, based mostly on guesswork and conventional classifications — conservative, liberal, swing.

Ideologically, though, this may be a tricky case. Conservative justices who might find the law constitutionally repugnant, for example, are also avowed champions of judicial deference to the decisions of the elected branches and of the principle that the court should reach constitutional issues only when all else fails.

Indeed, they could avoid it entirely, at least for the time being, by deciding that a law that bars courts from hearing tax cases until the IRS tries to collect applies to the health care case. A lower court took that position because the penalty for not being insured takes the form of a tax. The court will hear that argument on the first day.

The court will also hear arguments on whether the law's expansion of the Medicaid program to help finance the law infringes on the rights of states.

If the court does invalidate part of the law, it will also decide whether the entire statute must fall with it, or if the flawed section is "severable."

No opinions are expected until June.

What follows are explanations of each of the issues the court will consider starting next March 26. ■

FOR FURTHER READING: *State Medicaid programs, 2011 CQ Weekly, p. 1362; legal challenges, p. 292; enactment, 2010 Almanac, p. 9-3; provisions, p. 9-6.*

Six Hours, Three Days, Four Questions

Lawsuits were brought against the health care law across the country. The court chose to use the rulings by the 11th Circuit Court of Appeals as the vehicles for considering the issues.

Schedule for Supreme Court oral arguments on the health care law	Ruling of the 11th Circuit Court (*Florida v. HHS*)	Related federal appeals court decisions: 6th Circuit (*Thomas More Law Center v. Obama*)	D.C. Circuit (*Seven Sky v. Holder*)	4th Circuit (*Liberty University v. Geithner; Virginia v. Sebelius*)
Injunction *Monday, March 26, 10 a.m.* Does the anti-injunction act prohibit challenges to the individual mandate until the first penalty is collected in 2015?	Not considered	No	No	Yes
Individual Mandate *Tuesday, March 27, 10 a.m.* Can Congress require individuals to maintain a minimum level of health insurance or else pay a penalty?	No	Yes	Yes	No jurisdiction*
Severability *Wednesday, March 28, 10 a.m.* Can the individual mandate be severed from the rest of the law when considering its constitutionality?	Yes	Not considered	Not considered	Not considered
Medicaid *Wednesday, March 28, 1 p.m.* Can Congress condition federal Medicaid assistance to states on their adoption of new eligibility and coverage thresholds?	Yes	Not considered	Not considered	Not considered

*The court ruled that under the anti-injunction act, challenges to the individual mandate cannot be brought before the first penalty is collected, which would be in 2015.

BRANDEIS LAW SCHOOL

The Issues Before the Justices

By Gail Sullivan

Is It Too Soon to Rule?

A law called the Tax Anti-Injunction Act (AIA) could throw a wrench into all the speculation over how the mandate question will play out. And that might suit the court just fine, since as a general rule, it avoids deciding major constitutional questions unless absolutely necessary. The fact that the justices granted an additional half hour of argument to this question suggests it might very well be an escape hatch.

The gist of the AIA is this: Federal courts can't entertain a tax case until the government actually tries to collect. The rationale is that if everyone who had a beef with the Internal Revenue Service could put off paying taxes by suing, the government would be inundated with lawsuits, and it might seriously clog the revenue stream.

So if a taxpayer tries to sue prematurely, the lawsuit gets thrown out of court. That's what the 4th U.S. Circuit Court of Appeals did, and if the Supreme Court agrees, that's exactly what might happen to the health care law.

But what does a tax law have to do with the Affordable Care Act? The penalty for disregarding the "individual mandate" — that is, for failing to buy insurance — comes in the form of a payment included with the miscreant's federal income tax return. The 4th Circuit in *Liberty University v. Geithner*, said that no matter the label, the penalty was basically a tax. And until the tax is levied, any suit is a "pre-enforcement" action.

Of course, the health care individual mandate doesn't even take effect until 2014. Therefore, no penalties can be sought by the government until 2015. At that point, a taxpayer could sue, and then the case would have to make its way back up to the Supreme Court again.

To decide whether the AIA applies, postponing a decision on constitutionality of the mandate, the court must determine whether the penalty provision of the health care law is really a "tax."

Ordinary people know a tax when they owe it — and pay it. In this case, it's not quite so simple. The text of the AIA doesn't define "tax," so it's open season for parties to argue in favor of whatever definition best suits their purpose. Robert Long, the court-appointed attorney arguing that the AIA applies, urged the court to use the "ordinary meaning" of the word found in Webster's dictionary. This conveniently broad definition — "every species of imposition on persons or property" — certainly encompasses the penalty provision, bringing the lawsuit within the AIA's reach.

Long also points out that Congress directed the IRS to collect the penalty "in the same manner as taxes." In this view, if the penalty walks like a tax and talks like a tax, it must be a tax.

The challengers and the administration point out that the tax code defines penalty and tax differently, the latter having a "wide array of substantive and procedural statutory consequences . . . ."

The parties on this side of the issue note that the purpose of the health care law was not to raise revenue, but rather to punish noncompliance. They cite previous cases distinguishing a tax penalty from a penalty imposed as punishment for failing to meet some other legal requirement.

Even if it is a tax, the challengers argue this lawsuit is outside the scope of the AIA, which bars only lawsuits brought for the purpose of restraining a tax. That was not the purpose of the suits against the mandate. But this is just mincing words, maintains Long, who says the challengers can't make an end run around the AIA by characterizing their lawsuit as a challenge to the mandate rather than its enforcement mechanism. The 4th Circuit likewise found this argument laughable, pointing to Liberty University's complaint, which identified the penalty as a tax, and asked the court for an injunction against enforcement.

The consequences are dramatic either way. An election year ruling could provide a rallying cry for Republicans anxious for repeal or put wind in Obama's sails as he heads for a second term. If delayed, the uncertainty could endure for years as states, agencies, and businesses continue to spend billions implementing a law that could be deemed unconstitutional or, depending on the elections, repealed.

Is the Mandate Constitutional?

"The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

On these few words in Article I of the Constitution, Congress has constructed the edifice of the regulatory state with little interference, and considerable help, from the Supreme Court over the years. The New Deal laws, civil rights laws and environmental regulations have all been predicated on the commerce power.

And not since the New Deal has the court rejected any major act of Congress on Commerce Clause grounds.

But Florida and its allies in the suit against the health care law may find some hope in the two cases in recent years in which the court has put some limits on Commerce Clause power.

In a 1995 case, *United States v. Lopez*, the Court struck down a law making it illegal to have firearms in a school zone. Generally, laws that govern health, safety and welfare are the province of states. But the government argued that guns in schools handicap the educational process in a manner that would "result in a less productive citizenry . . . [and] have an adverse effect on the Nation's economic well-being."

The Court said that was a reach, finding that the effects on interstate commerce were "so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

A few years later, in *United States v. Morrison*, the Court found that a statute providing a civil remedy to victims of gender violence was unconstitutional on the grounds that gender-motivated crimes were not "economic activity."

While the spirit of those cases — there are limits on Congress — is helpful to the

challengers, the court has never had occasion to rule on whether Congress can require citizens to buy a commercial product. Nor has it considered whether Congress has the power to penalize "inactivity" — in this case, not buying insurance.

The fact that it has not dealt with these questions left the lower courts adrift.

The mandate imposes a tax penalty starting in 2014 on those who don't maintain health insurance coverage, be it through Medicare, Medicaid, an employer plan or individual purchase. The function of the penalty is to keep costs down by bringing healthy people into the insurance pool and deterring what are known as "free riders," who don't buy insurance and then rely on society to pay when they show up in the emergency room.

The challengers argue that Congress' power to regulate economic activity doesn't extend to the non-purchase of insurance, which in their view is inactivity. And the government, they argue, can't make an end run around this limit — mandating the purchase of insurance doesn't convert this inactivity into an activity that Congress can regulate.

The uninsured are outside the stream of commerce, and thus out of Congress' reach, they say. Like bringing a gun into a school zone, the choice to remain uninsured is too remote from its economic impact to be within Congress' power to regulate.

In support of the health care law, the government will point to a 2005 case, *Gonzalez v. Raich,* cited often in the Justice Department's brief. In that case, the Court held that a federal law banning marijuana possession trumped a California state law allowing Angel Raich to grow pot in her backyard for personal medical use. Local use, they reasoned, affected supply and demand in the national marijuana market, making the regulation of local use "essential" to effectuate Congress' larger goal of regulating the interstate drug trade. They distinguished the non-economic, criminal nature of the conduct at issue in *Morrison* and *Lopez* from a regulation of economic activity in this case.

Perhaps the most discussed part of *Raich* was a concurrence by Justice Antonin Scalia, who said it didn't matter whether growing pot in your backyard was "economic activity." He reasoned that, because all marijuana is "never more than an instant from the interstate market," even the small amounts grown by medical-marijuana users in California could undercut Congress' regulation of interstate marijuana transactions and was therefore within Congress' reach.

By that logic, the Court need only agree that the uninsured threaten to undercut Congress' otherwise valid goal of health care reform to uphold the mandate.

The government characterizes the mandate as regulating the consumption of health care, not the purchase of health insurance. Specifically, it's about how people "finance their participation in the health care market," be it through purchase of insurance or by "free riding" on the system.

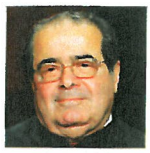
And just as Angel Raich's pot was, in Scalia's words, "never more than an instant from the interstate market," the government says the uninsured are never more than an instant from getting the flu or winding up in the emergency room.

In case the court is reluctant to find that the mandate is itself a valid exercise of Congress' commerce power, the government argues that the mandate is constitutional on the grounds that it is essential to effectuate health reform's "comprehensive regulatory scheme." This is the basis on which the court upheld the statute in *Raich,* albeit with the majority finding a connection to economic activity necessary to their conclusion.

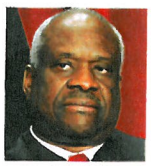
The government again takes a page from Scalia's book, arguing that it doesn't matter whether being uninsured counts as activity (economic or otherwise), because the uninsured threaten to undercut Congress' otherwise valid goal of health care reform. The challengers counter that, although Congress can remove barriers to enforcement of a regulatory scheme, it cannot "offset the costs . . . by conscripting strangers to that scheme who are otherwise beyond its commerce power."

Best Guesses

On the blog Monkey Cage, scholars Michael Bailey and Forrest Maltzman rated justices on their likelihood to overturn the law.



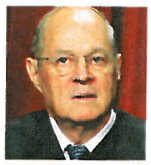
Antonin Scalia: Based on ideology and precedent, is a probable vote to overturn the health care law. He can surprise.



Clarence Thomas: Same probability as Scalia to overturn. The two often see eye to eye on cases of importance.

Samuel A. Alito Jr.: Nobody would be surprised if this appointee of George W. Bush was unreceptive to the Obama administration.

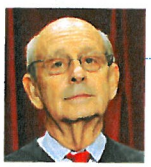
John G. Roberts, Jr.: More up for grabs than Alito, though the two often vote together as solid members of the conservative wing.



Anthony M. Kennedy: The proverbial swing vote has a strong respect for precedent that could sway him against overturning.

Elena Kagan: Obama's former solicitor general would shock the world if she voted to strike down the law. She's the newest justice.

Sonia Sotomayor: Obama's first appointee was a liberal appeals court judge. All assume she'll uphold if the court gets to the mandate.



Stephen G. Breyer: The former Harvard professor is the ideological opposite of Scalia and Thomas. He's generally predictable.

Ruth Bader Ginsburg: A former activist lawyer, she is the senior justice in the liberal wing of the court.

Is Congress Coercing States?

It's established that Congress may set the terms by which it offers federal money to the states. Conditional funding is the basis for federal mandates that affect highways, education, law enforcement and, of course, Medicaid.

Any decision upsetting that practice could, theoretically, have a greater impact on government than the ruling on the individual mandate. That's one reason most observers think the court will not go there, although they wonder why the justices have chosen to consider it.

The health care law would expand Medicaid coverage, starting in 2014, to include all

ALL: AFP / GETTY IMAGES

adults younger than 65 with incomes below 133 percent of the federal poverty level, or $30,657 for a family of four.

In the last hour of oral arguments, the court will take a break from concerns relating to the mandate and consider whether the health care law unconstitutionally coerces the states by requiring them to either expand the Medicaid program or lose funding for it altogether.

The court's decision to hear this issue was something of a surprise, given that conditional federal grants are a dime a dozen and that no federal court has ever found such a grant to be unconstitutionally coercive. Even the three-judge panel that struck down the mandate upheld the Medicaid expansion as constitutional.

But the Supreme Court has hinted at a limit to this particular exercise of Congress' spending power.

The key precedent is *South Dakota v. Dole.* There, the Court rejected a state's challenge to the withholding of federal highway funds from states that didn't set the legal drinking age at 21 but observed that ". . . in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"

In this case, the challengers argue that the Medicaid expansion passes that point by making the states an offer they can't afford to refuse. The "choice" to expand the program isn't voluntary at all, they say, because Congress is conditioning "not just newly available funds but pre-existing funding on a State's agreement to expand a program . . . ."

But the government counters that the states knew what they were getting into when they signed up. After all, when Congress created Medicaid, it reserved the right to make full program funding contingent on the acceptance of new conditions.

The reality is that the states have come to depend on federal matching funds to supplement the significant portion of their own budgets necessary to manage what has become the largest federal grant-in-aid program.

But the government says that the states are exaggerating this burden. For one thing, the federal government will pay 100 percent of the additional cost for the first three years, ratcheting down its contribution until 2020, when the states must pay 10 percent — a federal contribution far greater than in previous expansions.

Finally, the states appeal to principles of federalism, arguing that, without limits, Congress' spending power could obliterate the distinction between the power given to the federal government and that reserved for the states. Urging the court to identify the point of coercion, the states say there need not be a "wholesale invalidation of spending programs," because tying coerciveness to the sheer size of the Medicaid program and its connection to the mandate would result in a narrow ruling. But the government counters that asking the court to decide whether a federal grant is coercive forces courts into "the role of arbiters of conflicting policy judgments" and that the court has no business "delving into essentially political questions about states' differing policy choices and budgetary priorities."

If the Mandate Goes, What's Left?

IF THE SUPREME COURT declares the health care law's individual mandate unconstitutional, it must decide whether the rest of the law can go into effect.

The law's challengers would toss the whole thing out the window. But the government would scrap just two provisions to which it claims the mandate is "essential."

Since neither side thinks the law should take full effect without the mandate, a Supreme Court-appointed attorney, H. Bartow Farr III, will argue that position.

The decision on severability, should there be one, is likely to have political ramifications. If the court strikes the mandate but leaves everything else intact, Democrats can at least claim a partial victory.

If the justices cut out all or most of the law, opponents will have bragging rights as the November election approaches —confirmation that the Democrats abused their power.

That fits nicely with the portrait being sold by Republican presidential contenders of a White House and Democratic Party that disregard the Constitution.

Lawmakers sometimes include a severability clause in legislation to make it clear that if part of the law is found unconstitutional, they want the rest of it to go into effect.

Nobody seems to know why this clause was left out of the health care law — maybe it was an oversight or maybe it was intentional — but, either way, it doesn't matter much to the Supreme Court.

The court approaches situations such as this like an optimistic surgeon, cutting out the diseased parts in hopes of saving the patient. This "presumption of severability" can be overcome when the remains of the law appear unable to function as Congress intended.

In any case, congressional intent may be relevant to figuring out whether Congress intended certain provisions to go into effect without the mandate, the likeliest candidates being the guaranteed-issue requirement and pre-existing condition exclusion, which prevent insurance companies from denying affordable coverage to sicker people.

The government argues that those provisions should be thrown out with the mandate if it is struck down to avoid "an adverse selection cascade," in which "healthy individuals would defer obtaining insurance until they needed health care, leaving an insurance pool skewed toward the unhealthy. Premiums would increase significantly under that scenario, and the availability of insurance would decline — exactly the opposite of what Congress intended."

The 11th U.S. Circuit Court of Appeals, which struck down the mandate, found this unpersuasive. It upheld the rest of the law, finding that "the lion's share of the Act has nothing to do with private insurance, much less the mandate."

The challengers counter that everything must go, because the act was "a grand bargain with nearly every provision crucial to its success."

"The ultimate question is whether Congress would have enacted the statute without the invalidated provision," says the brief for Florida and other states that have attacked the law. "Here, the answer is clear. Congress considered the individual mandate essential to the Act's functioning, to its passage, and to its ability to achieve Congress' goal of near-universal health insurance. This Court cannot remove the hub of the individual mandate while leaving the spokes in place without violating Congress' evident intent."

— GAIL SULLIVAN